Supreme Court, U.S.
FILED

No. 10-964

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In the
Supreme Court of the United States

ROBERTO ROMERO, M.D.,
Petitioner,

v.

IRINA BUHIMSCHI, M.D.; YALE UNIVERSITY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), the Court stated in *dictum*, that a claim under the Lanham Act, 15 U.S.C. § 1125(a)(1), "would undoubtedly be sustained if Dastar had bought some of New Line's Crusade videotapes and merely repackaged them as its own."

(a) Do scientific data in a medical article, published in a medical journal that is offered for sale to the public, constitute a communicative product to which the Lanham Act applies?

(b) Did Respondents "repackage" data they co-produced with Petitioner in Detroit, Michigan, and violate Section (a)(1)(A) of the Lanham Act, by publishing the identical data, and creating confusion within the scientific community as to where the research was conducted and by whom, by falsifying the date of the first experiments, removing Petitioner's name from publication, using designations that obfuscated where the research was performed, and falsely characterizing the data in a press release as work produced at Yale University by a "Yale team"?

2.

In dismissing Petitioner's defamation claims on summary judgment, did the Sixth Circuit deny Petitioner the process he was due under the Fifth and Seventh Amendments to the U.S. Constitution, and

depart so far from well-settled procedures as to call for the exercise of this Court's supervisory power,

(a) by disregarding and misstating material facts, and failing to correct the omissions and misstatements after they were brought to the court's attention; and

(b) by basing its interpretation of Michigan law entirely on unpublished cases and cases that had no precedential value in Michigan, instead of Michigan Supreme Court cases, including a case decided during the pendency of Petitioner's appeal that was drawn to the court's attention?

PARTIES TO THE PROCEEDINGS

Petitioner, Roberto Romero, M.D., was the plaintiff-appellant below. Respondents Irina Buhimschi, M.D., and Yale University, were defendant-appellees below. Claims against Carl Weiner, M.D. and the Royal College of Obstetricians and Gynecologists, defendants below, were dismissed under Fed. R. Civ. P. 12(b)(6), and the decision was not appealed.

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OPINIONS BELOW

The Sixth Circuit's opinion, affirming dismissal of Petitioner's Lanham Act claim for failure to state a claim, and grant of summary judgment on his defamation claims, is unpublished, and reprinted in the Appendix to this Petition (App.) at pages 1a to 28a.

The district court's opinion granting summary judgment on Petitioner's defamation claims is reproduced at App. 29a-59a, and the court's opinion denying Petitioner motion for reconsideration is reproduced at App. 60a-90a.

The district court's opinion adopting the Magistrate's Report and Recommendation, dismissing Petitioner's Lanham Act claim, but denying Respondents' motion to dismiss his defamation claims, is reprinted at App. 91a-104a, and the Magistrates Report and Recommendation is reproduced at App. 105a-148a.

The letter denying a petition for *en banc* review is reprinted at App. 149a-150a.

JURISDICTION

The Sixth Circuit affirmed the lower court decisions on September 13, 2010, App. 1a, and a petition for *en banc* review was denied on October 26, 2010. App. 149a-150a. Therefore, this petition is timely filed under Supreme Court Rule 13.1, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant sections of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), are reproduced at App.151a, and provide:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person...
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."[1]

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[1] The Sixth Circuit's contention that Petitioner did not make clear which provision of § 43(a) he was relying on, App. 13a, is incorrect *See* Appellant's Brief at 67 (stating "Plaintiff relied on the following language from the Lanham Act for his claim under the act" and quoting 15 U.S.C. § 1125(a)(1)(A) *verbatim*).

The relevant provisions of the Fifth and Seventh Amendments to the U.S. Constitution are reproduced at App. 152a.

STATEMENT

I. BACKGROUND ISSUES

The novel and important question of federal law presented by this Petition is whether scientific data contained in an article published in a medical journal that is offered for sale to the public constitute a communicative product to which the Lanham Act applies. Relying on this Court's *dictum* in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), Petitioner, Romero, alleged that Respondents violated the Lanham Act by passing off research Buhimschi conducted while she was an Assistant Professor at Wayne State University (WSU), in Detroit, Michigan, with Romero and the Perinatology Research Branch (PRB) of the *Eunice Kennedy-Shriver* National Institute of Child Health and Human Development (NICHD), as work done at Yale University by a Yale team.

Romero's claim relied on the distinction *Dastar* made between a communicative product, the physical embodiment or "packaging" of the product, and the ideas embodied in the product. In *Dastar*, a unanimous Court held that the phrase "origin of goods" cannot be interpreted to connote the person or entity that originated the ideas embodied in a communicative product. *See Dastar* at 32. However, the Court emphasized *in dictum* that if a communicative product was "repackaged" and relabeled as produced by someone other than those who actually produced the

product, the person or entity that produced the product would "undoubtedly" have a cause of action under the Lanham Act. *Id.* at 31.

Romero contended that Buhimschi violated the Lanham Act by repackaging and relabeling the research and data she co-produced with Romero by falsifying the date of the first experiments, removing Romero's name from authorship, expunging everything from the original manuscript that could link the research to Romero or the PRB, and by issuing a press release that characterized the work as produced at Yale by a "Yale team" of "Yale researchers". This repackaging and relabeling created confusion within the scientific community as to where the research was conducted and by whom. Romero contended that his claim is distinguishable from a failure-to-attribute-authorship claim because Romero actually co-produced the communicative product that Buhimschi passed off as the work of a Yale team, and did not merely contribute ideas embodied in the product, or make some contribution that Buhimschi changed or modified at a later date.

The question presented is complicated by the fact that the courts below disregarded and misstated material facts relevant to both Romero's Lanham Act and defamation claims. This raises the added questions of whether a litigant, whose material evidence has been disregarded and misrepresented by the courts, has been afforded a meaningful opportunity to be heard, and whether the methods used below to dispose of Romero's defamation claims deviated so far from well-settled procedures as to call for the exercise of this Court's supervisory power.

II. BACKGROUND FACTS

This law suit originated in conduct by Buhimschi, a medical laboratory researcher, that an investigating committee at WSU (WSU-IC) determined constituted scientific misconduct, App. 156a, and that the Chairman and former Chairman of Obstetrics and Gynecology (Ob-Gyn) at Yale University (Yale) determined was inappropriate. App. 160a, ¶ 1. The misconduct related to research Buhimschi conducted with Romero and the PRB, which is housed at WSU pursuant to a service contract with NICHD.[2] Romero is Chief of the PRB, and a tenured member of the NIH.

To understand Romero's and WSU's response to Buhimschi's misconduct, it is necessary to understand the obligations created by WSU's contract with NICHD. This contract committed WSU to invoke its Policy and Procedures on Misconduct to protect the PRB from misconduct of its employees related to their collaborations with the PRB. App. 163a, ¶ 5; App. 165a. Independently of WSU's contract with NICHD, federal regulations required WSU to have policies and procedures on scientific misconduct, and to adhere to them. *See* 42 C.F.R. § 50.103.

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[2] The PRB was created pursuant to a mandate in the NIH Revitalization Act of 1993. *See* 42 U S.C. § 285g-6. It is housed off the Bethesda campus because NIH's Clinical Center does not have an Obstetrical Service. The PRB was originally housed at Georgetown University Medical Center, but NICHD terminated its contract with Georgetown because of conduct by its faculty very similar to the conduct that gave rise to this law suit. App. 163a, ¶ 4

The research at issue involved a relatively new technique for identifying proteins based on their molecular weight referred to by the acronym SELDI (SELDI research).[3] The SELDI experiments were conducted between April 11, 2002 and June 19, 2002. App. 169a, ¶ 2. The results of the research were reported in abstract form to the Society for Maternal-Fetal Medicine, App. 173a-174a, and submitted for publication to The Lancet, a prestigious English medical journal, on November 3, 2002 ("Lancet Manuscript"). App. 175a. Romero was senior (last named) author on both the Abstract and the Lancet Manuscript. App. 173a, 175a.[4] Robert Christner,

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[3] Buhimschi asked Romero to collaborate on the SELDI research at the end of March, 2002, after she returned from an educational course in Switzerland. App. 168a (Buhimschi learned the SELDI technique after she joined the WSU faculty while working on other research projects with Romero unrelated to the SELDI research at issue). Romero had already made plans to collaborate on this research with Dr. Lance Liotta's group at NIH, before Buhimschi joined the WSU faculty (on July 1, 2001), App. 171a-172a, but agreed to Buhimschi's request because Liotta's laboratory was backed up, and a key member of his team had developed health problems. Docket No. 40-#6, ¶ 6, 11, 13 & Docket No 92-#5 at 4-15 However, Romero showed Buhimschi his correspondence file with Liotta App. 169a, ¶ 1, and explained to her that if the experiments were successful the results would have to shown to Liotta to permit him to make a contribution if he could and wished to do so. Docket No. 120, ¶ 16.

[4] Buhimschi attested in writing that Romero met the criteria of authorship for manuscripts submitted to biomedical journals, App. 176a, acknowledged that the SELDI research could not have been done without Romero, App 181a, and, in an unsolicited (see App. 167a) To Whom it May Concern (TWIMC) Letter dated October 16, 2002, recounted Romero's contribution to the SELDI research. App. 169a.

Ph.D., a field scientist employed by the Ciphergen Corporation, who had expertise in the SELDI technique, assisted Buhimschi with the experiments, and helped identify the chemical nature of the proteins detected by SELDI. App. 169a, ¶ 3.[5] The Ciphergen Corporation indicated it would apply for a patent, App. 216a, and Buhimschi determined that Romero's contribution to any patentable invention in the SELDI research was equal to hers (40%), and the remainder (20%) was contributed by Christner. App. 178a-179a.[6]

The Lancet Manuscript received a favorable review, and Buhimschi notified Romero of this fact in February, 2003. App. 201a, ¶ 2. However, between submission of the Lancet Manuscript and receipt of these reviews, Buhimschi's husband, Catalin, a Fellow in the Department of Ob-Gyn at WSU, was informed that his contract would not be renewed because of concern about his clinical care and patient safety. App. 186a-190a. Buhimschi applied for a position as a research associate at Yale, and Romero gave Buhimschi a positive recommendation when Dr. Charles Lockwood, Chairman of Ob-Gyn at Yale, telephoned Romero in February, 2003. App. 159a, ¶ 3.

On March 5, 2003, before she moved to Yale, Buhimschi submitted a revised version of the Lancet Manuscript to The Lancet for publication (Revised Lancet Manuscript), from which she removed Romero's

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[5] SELDI does not identify the chemical nature of the proteins, and therefore, cannot distinguish between two proteins that have the same mass SELDI also cannot measure the concentration of proteins.

[6] The patent application was denied.

name and the names of other PRB members from authorship without telling them, and deleted any direct reference to the PRB. App. 192a. The article published in the BJOG was identical, word for word, to this Revised Lancet Manuscript, except that the date of the first experiments was falsified,[7] and the affiliation of the authors, the site of the research, and source of materials were changed. *See* App. 192a-194a; *compare* App. 195a-196a, ¶ 2. The SELDI results were not changed in any way, and the results first submitted for publication to The Lancet on November 3, 2002, resubmitted to The Lancet for publication on March 5, 2003, and ultimately published in the BJOG were all identical.[8] The WSU-IC determined that Romero was a rightful author of the Revised Lancet Manuscript. App. 156a, ¶ 2. Dr. Owen Rennert, Scientific Director of Intramural Research of NICHD,

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[7] *See* App 193a, ¶ 1(Revised Lancet Manuscript, stating that first stage experiments were conducted in April, 2002); *accord* App. 169a, ¶ 2 (TWIMC letter stating that first stage experiments were conducted between April 11-23 (2002)); *compare* 196a, ¶ 1 (BJOG article, stating that experiments were run between May, 2001 and April, 2002).

[8] In addition to stylistic changes, data that had no affect on the results, and that were contributed by individuals other than Romero, were removed. These were thirteen amniotic fluid samples collected by Buhimschi's husband, Docket No. 92-#6 at 129-30, and the results of an ELISA assay, run at Buhimschi's request, App. 180a, by two members of the PRB, Drs. Rathnasabapathy and Edwin (who were not authors on the Abstract, *see* App. 173a, because this did not include the ELISA data). ELISA is an acronym for a standard method for measuring the concentration of proteins, which Buhimschi used to check that one of the proteins identified by SELDI was what she thought it was. After the proteins were identified chemically the following month, App 169a, ¶ 3, these data were redundant.

independently determined that both Romero and Dr. Chaiworapongsa were rightful authors on the BJOG article. App. 198a, ¶ 1, 2.

The Revised Lancet Manuscript was accepted for publication, and had reached the galley proof stage, Docket No. 91-#3, when the Editor of The Lancet, Dr. Charles Young, halted publication. Docket No. 91-#4. Romero had telephoned Young to inquire about the status of the Lancet Manuscript, App. 201a, ¶ 1, and Young realized for the first time that Buhimschi had not informed her coauthors that she had removed their names from authorship. App. 202a, ¶ 1. Young asked for, Docket No. 91-#3, but did not accept Buhimschi's explanation for her actions, Docket No. 94-#1 at 1,[9] and Buhimschi withdrew the manuscript from publication. Docket No. 94-#2.

On June 2, 2003, after notifying his superiors at NICHD, Romero informed WSU officials of Buhimschi's actions, and asked that WSU resolve the matter. App. 202a, ¶ 2. Dr. Ray Stinson, WSU's Assistant VP for Research, attempted to resolve the matter without invoking WSU's Policy and Procedures

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[9] Buhimschi told Young that Romero's only contribution to the research were the ELISA data, which Romero had published without her knowledge in another journal. Buhimschi knew this was false because the publication she was referring to involved completely different research that was completed on January 29, 2002, two months before she had even asked Romero to collaborate on the SELDI study. *See supra* note 3, App. 220a, ¶ 3. Buhimschi's claims about Romero's contribution to the SELDI research were also inconsistent with the attestation she signed, App. 176a, and her own, unsolicited description of Romero's role in the SELDI research. App. 169a.

on Scientific Misconduct, App. 204a, ¶ 3, but Buhimschi failed to cooperate. App. 204a-205a. Wayne State then invoked its Policy and Procedures on Scientific Misconduct on June 12, 2003, and opened an inquiry to determine if there was sufficient evidence of misconduct to warrant an investigation. App. 205a, ¶ 8. Buhimschi again failed to cooperate, App. 206a, and since failure to cooperate with an inquiry was a reason to open an investigation, *id.*, WSU opened an investigation, App. 206a, ¶ 13, but did not commence it until September 3, 2003, two months after Buhimschi had moved to Yale. App. 208a-209a. On June 30, 2003, Romero, acting on instructions of NIH attorneys, informed Stinson that he agreed to assume the role of complainant for the purposes of the investigation. App. 210a-211a. Dr. John Malone, WSU's Chairman of Ob-Gyn, and Dr. Robert Sokol, former Dean of WSU Medical School and Chairman of Ob-Gyn, asked to be added as complainants. App. 206a, ¶ 12.

Buhimschi also failed to cooperate with WSU's investigation. App. 153a-154a. She did not testify at the hearing before the WSU-IC on January 26, 2004, *id.*, even though WSU offered to pay her and her husband's travel expenses, Docket No. 39-#12 at 14, ¶ 4, and she did not provide any of the information and documents the WSU-IC had requested. App. 154a, ¶ 1. Buhimschi alleged that WSU could not provide her due process because of a conflict of interest created by its contract with NICHD to house the PRB. App. 154a-155a, 184a, ¶ 3. Her allegations were considered by the WSU-IC, but no conflicts were identified. App. 155a, ¶ 1.

In late July, 2003, after she had moved to Yale, Buhimschi informed Lockwood of her actions, App. 159a-160a, and justified them by claiming that Romero's only contribution to the research was removed from the Revised Lancet Manuscript, App. 160a, ¶ 1, and that Romero asked her to add "another NIH employee" as an author, even though he had made no contribution to the research. *Id.* Buhimschi knew that both claims were untrue. *See e.g.* App. 169a (describing Romero's contribution to the SELDI research); App. 216a-217a (acknowledging that offer of authorship to Liotta was contingent on him wanting to, and being able to make a contribution that would warrant authorship). Later Buhimschi told Yale officials that Romero had "required her to add himself and three others and their data for his own professional advantage". App. 184a, ¶ 2; *compare* App. 180a (indicating that the data referred to - the ELISA assays - were run at Buhimschi's, not Romero's, request).

After Lockwood told Buhimschi that her actions had been inappropriate, Buhimschi consulted Lockwood's predecessor as Chairman of Ob-Gyn, Dr. Frederick Naftolin, who also concluded that Buhimschi's actions had been inappropriate. App. 160a, ¶ 1. On July 11, 2003, Naftolin telephoned Romero, and on August 15, 2003, met with Romero in Washington, D.C. to discuss the reasons Buhimschi had given for her actions at Yale, Docket No. 120, ¶ 19, 20, and relayed the information he received from Romero to Dr. Lawrence Cohen, Yale's Research Integrity Office and Special Advisor to the Dean of Yale Medical School. App.158a. Naftolin withdrew from involvement in the matter after WSU commenced

its investigation in September, 2003. Docket No. 126-#8.

On October 14, 2003, Romero responded to several emails in which Buhimschi professed an interest in resolving the dispute, and copied Lockwood on his letter. App. 218-221a. Lockwood told Romero that he had the support of Yale at its highest levels, App. 222a, and later advised Buhimschi to do everything to resolve the dispute because if WSU had jurisdiction, and found that she had engaged in misconduct, Yale would have to take action. App. 223a. However, far from having any intention of correcting her actions, Buhimschi asked her former Chairman at the University of Maryland, Dr. Carl Weiner to contact the Editor of the BJOG, Professor Jim Thornton, to inquire if the BJOG would be interested in publishing the Revised Lancet Manuscript. Docket No. 35-#5.

In an email dated October 10, 2003, Weiner, who had been removed from his position as Chairman by that time, related a totally fabricated account of the SELDI research to Thornton, and made numerous false defamatory statements about Romero to induce Thornton to publish the Revised Lancet Manuscript in the BJOG. Docket No. 35-#5, App. 49a, ¶ 3. For example, Weiner claimed that Romero had no knowledge of the SELDI research until he saw "the finished product", that Romero deceived his superiors at NICHD about the origins of the SELDI research, and that Romero was claiming "authorship" on the Lancet Manuscript because he wanted to assert rights to a patent, Docket No. 35-#5, when exactly the opposite was true. *See* App. 167a. Weiner even claimed that the SELDI research began in his laboratory in Maryland, Docket No. 35-#5, and Buhimschi falsified

the date of the first stage SELDI experiments in Revised Lancet Manuscript she submitted to the BJOG to corroborate this false representation. *See supra* n. 7.[10] Thornton told Weiner the "BJOG likes controversy", but that he would have to contact Romero to get his version of events, but never did. Docket No. 39-#11 at 5. The BJOG published the Revised Lancet Manuscript knowing its authorship was disputed, which the Committee on Publication Ethics (COPE) determined violated editorial standards for publications in biomedical journals. App.224a-225a.

On May 19, 2004, the WSU-IC published its findings and conclusions that Buhimschi's conduct had seriously deviated from commonly accepted practices within the scientific community related to research, and constituted scientific misconduct. App. 156a. The committee found Buhimschi's explanations for her actions inconsistent and contradictory, and concluded that she had engaged in a pattern of deception and obfuscation, and had done "everything in her power to prevent the removed co-authors...from seeing the reviews of the original manuscript and the revised manuscript". App. 156a, ¶ 2. The WSU-IC found no substance to Buhimschi's claim that she had made many efforts to resolve the dispute. App. 155a, ¶ No. 19.

Wayne State's Procedures required WSU to notify a variety of individuals of a finding of misconduct.

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[10] Falsification of the date of the first stage experiments were necessary to corroborate Weiner's false representations to Thornton because Buhimschi joined the WSU faculty in July, 2001, and, therefore, experiments conducted in April, 2002, could not have begun in Weiner's laboratory in Maryland.

Docket No.125-#7 at 7, ¶ 7.2. On October 7, 2004, Dr. John Oliver, WSU's Vice President for Research, notified these individuals of WSU-IC's findings, including Yale officials. Docket No.130-#5. On October 19, 2004, Stinson wrote to Cohen specifically asking Yale to ensure that the SELDI research was not published without proper attribution, and to assist with placing the raw data in the public domain, consistent with NIH's policy. Docket No.130-#6 at 1.[11]

However, by the time Cohen received Stinson's request, Yale had already received a two million dollar grant based on the SELDI research Buhimschi had conducted in Detroit with Romero, Docket No. 130-#8 at 2, and the BJOG had already accepted the revised *Lancet Manuscript* for publication (on June 16, 2004). App. 196a. By the time Cohen responded to Stinson's letter on December 17, 2004, Docket No. 130-#6 at 4, the BJOG had already published the Revised Lancet Manuscript in electronic form (on November 11, 2004), App. 229a-230a, and Buhimschi was working with Yale's publicity department on a press release that described the work Buhimschi did at WSU with Romero and the PRB as that of "Yale researchers" and a "Yale team". App. 231a-233a.

Cohen failed to inform Stinson of these facts. Docket No. 130-#6 at 4. He extemporized on a number of pretexts, *see* Docket Nos. 153-#11, while misleading Stinson into believing that Yale intended to cooperate

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[11] There had been a long standing agreement between Deans of universities that they would accept each other's findings regarding scientific misconduct. Docket No.153-#18, ¶ 3. WSU anticipated that Yale would abide by this understanding. *Id.*

with WSU to insure that the SELDI research was not inappropriately published. Contrary to the court's representation that "When the committee's findings were forwarded to Yale medical school...Yale responded by appointing a committee of its own", App. 53a, ¶ 3, Yale did not appoint an ad hoc committee until May 4, 2005, App. 183a, long after the SELDI research was published in the February, 2005 issue of the BJOG, App. 195a, and WSU's requests were impossible to satisfy. The ad hoc committee Cohen appointed also extemporized on a variety of pretexts, and never actually investigated Buhimschi's actions. Docket No. 153-#18.

On January 20, 2005, Buhimschi appealed the WSU-IC's finding that she had engaged in scientific misconduct, and submitted a 31-page, single-spaced Appeal Letter, to which she attached 114 exhibits. Docket No. 119-#4. An appeal under WSU's Procedures is limited to "specific elements or portions of the final report which the respondent believes to be in error". Docket No.125-#7 at 8, ¶ 10.3. In her Appeal Letter, Buhimschi did not deny her conduct or identify any errors in the WSU-IC's report, but launched personal attacks on Romero (and WSU officials), and accused Romero of numerous improprieties related to the SELDI research. Docket No.119-#4, ¶ 1.3, 1.5, 1.9, 1.12, 1.13, 1.20, 1.25, 1.26, 2.8 and 3.1. Buhimschi's allegations were concocted and scandalous. *See* App. 46a-48a, 184a. Contemporaneous business and laboratory records,[12] and Buhimschi's own written and

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[12] *See e.g.* App. 180a; Docket Nos. 135-#1, 135-#3, 135-#5.

recorded statements,[13] proved that Buhimschi knew her statements were false, App. 261-264a. The appeal was denied on February 16, 2005. Docket No. 95-#8 at 12.

Romero first learned that Buhimschi had resubmitted the Revised Lancet Manuscript for publication to the BJOG, and that the BJOG had accepted the manuscript for publication, on January 26, 2005, when he received a copy of Yale's press release. App. 231a-233a. Romero showed the press release to Oliver who then wrote to Thornton on January 31, 2005, to inform Thornton that the research published in the BJOG was conducted at WSU, not Yale, and that Buhimschi was found to have committed scientific misconduct for removing the names of her research collaborators from the Revised Lancet Manuscript. App. 234a-236a.

Oliver wanted to know what information was provided to the BJOG to induce it to publish the Revised Lancet Manuscript. App. 235a, ¶ 4,5. Thornton explained the understanding on which the Revised Lancet Manuscript was accepted for publication, and identified several documents he had received from Buhimschi and Weiner on which that understanding was based, which included the October 10, 2003 email Thornton had received from Weiner. App. 238a. However, Thornton indicated that before he could provide copies of these documents to WSU, he would have to obtain Buhimschi's and Weiner's permission because the documents were provided to him in confidence. *Id.*

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[13] *See e g* App. 169a, 175a, 178-179a, 216a-217a.

On March 14, 2005, Buhimschi responded to Thornton's request for permission to provide copies of her correspondence with the BJOG to WSU by sending Thornton a copy of her Appeal Letter and exhibits. App. 2264a. Buhimschi misled Thornton into believing that the Office of Research Integrity (ORI) had determined that she had not engaged in scientific misconduct, and that the contrary finding by WSU was based on incomplete information, and bias from a conflict of interest. *Id.* In fact, ORI had instructed Buhimschi not to refer to ORI in connection with this matter because ORI had no jurisdiction in the matter. App. 228a. The BJOG accepted Buhimschi's representations about ORI and her not having received due process as true, and Professor Philip Steer, who replaced Thornton as Editor, issued a statement that the BJOG would correct the authorship of the BJOG article "should an appropriately constituted body after due process recommend a correction of authorship". App. 2253a, ¶ 2. Romero's defamation claims were based on the publication of Buhimschi's Appeal Letter to the BJOG and subsequently to Yale officials, and on the defamations contained in Weiner's email, Docket No. 35-#5, and Cohen's letter to Yale officials, App. 184a-185a.

III. DECISIONS BELOW

A. Lanham Act Claim.

The district court accepted the Report and Recommendation of the Magistrate, and held that Petitioner's claim was foreclosed by this Court's decision in *Dastar*. App. 95a-96a. The Sixth Circuit affirmed, and, like the district court, construed Petitioner's Lanham claim to be a claim for failure to

attribute authorship, which failed to state a claim under *Dastar*'s holding.

> "To the extent that Romero's claim relies on § 43(a)(1)(A)'s 'origin of goods' prong, the claim clearly falls within the scope of *Dastar*. Aside from the fact that Dastar involved a video and this case involves a manuscript, the cases are nearly identical because both plaintiffs alleged that the defendants used portions of the plaintiff's work but failed to attribute the work to the plaintiffs." App. 14a.

The court's analogy ignored the crucial difference between the facts of this case and *Dastar*. In *Dastar*, defendants took non-copyrighted material in the public domain, and used it to create its own product - the Dastar Video. *Dastar*, 539 U.S. at 26-27. In this case, Buhimschi did not take "contributions" by Romero and incorporate them into a new communicative product. Buhimschi simply repackaged the *identical* SELDI research and results she co-produced with Romero, did not change or alter the product in any way, and relabeled it by falsifying the date of the first experiment, removing Romero's name from authorship, obfuscating the site of the research, and by passing the research off as conducted at Yale by a Yale team to create confusion within the scientific community as to where the product was produced and by whom.

B. Defamation Claims.

The district court denied Respondents' motion to dismiss Petitioner's defamation claims, App. 100a-

101a,[14] but a different judge subsequently declared Romero's defamation claims nonjusticiable, App. 30a, and dismissed them on summary judgment. Relying on an unpublished case, and three published cases by the Michigan Court of Appeals that have no precedential value in Michigan, and had no facts analogous to the facts of this case, App. 50a-53a,[15] the district court held that, as a matter of Michigan law, a person consents to the publication of defamation with actual malice merely alleging wrongdoing against another person. *Id.* The court stated that "Romero claims that each of these publications amounts to defamation per se, entitling him to judgment against Buhimschi...", but failed to acknowledge Romero's evidence proving that Buhimschi published her defamations with actual malice - i.e. with knowledge or reckless disregard of falsity - on which Romero actually based his entitlement to judgment. App. 50a.

The court held that the notification WSU provided to Yale about its finding of scientific misconduct constituted an invitation *by Romero* from which his consent to the publication of Buhimschi's Appeal letter

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[14] The court dismissed Petitioner's defamation claim against Weiner based on the Michigan Supreme Court's decision in *Mitan v. Campbell*, 706 N.W.2d 420 (Mich. 2005), decided during the preparation of the complaint, which changed Michigan's law of republication. *See* Nicholas Kadar, *Mitan v. Campbell: The Michigan Supreme Court's Analysis Changes Common Law Of Republication And Protects Repetitions of Defamations That Have No Social Value*, 54 Wayne Law Rev. 1701 (2008).

[15] By statute, decision of the Michigan Court of Appeals prior to 1990 have no precedential value in Michigan. *See* MCR 7 21(j). The court relied on three published cases, which were decided in 1980, 1978 and 1964.

(written three months later) and Weiner's email (which Romero knew nothing about at the time) at Yale was implied as a matter of Michigan law. App. 53a. The court characterized these republications as "prompted" by Romero, *id.*, disregarded that WSU's Policy and Procedures *required* WSU to notify Yale, and that federal regulations *required* WSU to have policies and procedures on scientific misconduct, *see* 42 C.F.R. § 50.103, and held that it would be an "impossibly strained reading of the facts" to construe that WSU submitted the report to Yale "on its own initiative". App. 54a. Similarly, the court held that Romero's consent to the republication of Buhimschi's Appeal Letter to the BJOG was implied as a matter of Michigan law from Oliver's January 31, 2005 letter to Thornton. App. 53a.

Petitioner moved for reconsideration, and drew the court's attention to several omissions and misstatements of material fact in the court's opinion, and to limitations on the scope of implied consent the court had overlooked. Docket No. 154-#1. The court denied the motion. App. 89a. Although the court stated that it was inclined to agree with Petitioner that, as a matter of public policy, there was no good reason to imply consent to defamations published with actual malice, the court interpreted "silence" on this question in the cases on which the court relied as implicit rejection of this argument. App. 78a, n. 7.

The Sixth Circuit, also relying entirely on unpublished cases and decisions that have no precedential value in Michigan, App. 20a-22a,

affirmed.[16] The court declined to correct the district court's omissions and misstatements of material fact, *see* App. 240a-244a, and compounded them with additional factual assertions that were not true. *See e.g.* App. 6a, ¶ 3 (stating that BJOG published the article at issue without Romero or his team, "In spite of Romero's protests"); *see also* App. 250a-251a. The panel distinguished *Smurthwaite v. News Pub. Co.*, 83 N.W. 116 (Mich, 1900), the only Michigan Supreme Court case it considered, and misleadingly implied that Romero had relied only on *Smurthwaite*. App. 23a. The court disregarded the other Michigan Supreme Court decisions on which Romero had actually relied, including *Dadd v. Mount Hope Church*, 780 N.W.2d 763 (Mich. 2010), App. 20a-28a, which was decided during the pendency of the appeal, but drawn to the court's attention through Fed. R. App. P. 28(j).

WHY PETITION SHOULD BE GRANTED

I. LANHAM ACT CLAIM.

The Court should grant petition on Petitioner's Lanham Act claim because the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court, and decided it in a way that conflicts with the Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). Sup. Ct. R. 10(c).

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[16] Only three of the eight decisions relied on by the appellate panel were published, which were the same published cases as relied on by the district court.

In *Dastar*, this Court distinguished between a "repackaging" claim, and a claim for failure to attribute authorship. *Dastar* at 31-32. The distinction was implicitly based on the difference between a communicative product and its physical embodiment or "packaging". The Court explained that the purpose of the Lanham Act was to insure that those who made a communicative product derive not only the financial but also the "reputational-related rewards" of a desirable product, *Dastar* at 34 (citation omitted), and emphasized in *dictum* that repackaging of a communicative product that, by implication, deprived someone who actually made the product of the reputational-related rewards for making it, would "undoubtedly" give rise to a claim under the Lanham Act. Romero's repackaging claim was based on *Dastar*'s *dictum*.

"Reputational-related rewards" are the main rewards scientists or physicians engaged in academic research derive from their work product, and these rewards accrue only if their research is published to the scientific community in a peer-reviewed journal. The NIH considers such publications to be "the fulfillment of the responsibility to communicate research results to the scientific community for external evaluation", Docket No. 111 (#8) at 10 (Guidelines for the Conduct of Research in the Intramural Program of NIH), and to be essential to the advancement of knowledge. *Id.* at 9.

If, as occurred in this case, a scientist's work product is repackaged and relabeled to create confusion within the scientific community as to where the research was conducted and by whom, the scientist is deprived of the reputational-related reward from his

or her work that the Lanham Act protects. The policy of external evaluation will also be frustrated, and will likely lead to misallocation of resources by diverting public research funds away from their most productive use as a result of the false designations.

The courts below denied Petitioner the reputational-related rewards of the SELDI research by erroneously equating authorship on scientific article published in a peer-reviewed journal with authorship of a textbook. App. at 12a (citing *Zyla v. Wadsworth*, 360 F.3d 243 (2004)). This analogy is flawed, misconstrues the nature of the communicative product in each case, and frustrates an important purpose of the Lanham Act - to protect reputation-related rewards that accrue from the production of a desirable communicative product. *Dastar* at 34.

In the case of a textbook, the book itself is the communicative product. The authors are entitled to the reputational-related rewards that accrue from the sale of the book, but there is no "communicative product" apart from the textbook itself that the authors have produced, and that entitles them to any reputational-related rewards over and above that which accrues from the textbook itself.

An article published in a scientific or medical journal is neither a work of literature nor pedagogy, and its authors stand in a different relationship to the text from the authors of a textbook. In the case of such an article, the authors have produced an actual communicative product that is separate from the text itself - the research results or data. It is these results, and the methods by which they were obtained, that

constitutes the communicative product, not the prose used to convey them.

The research and its results, not the text, are what is of interest to the scientific community. They determine whether an article will be accepted for publication, and the reputational-related rewards that will accrue to the authors from the article. The text or prose is merely the medium used to convey the communicative product of interest to the target audience. Indeed, The Lancet made substantial editorial changes to the text of the Revised Lancet Manuscript it was about to publish, *see* Docket No. 91-#3, whereas the BJOG made no changes to the text of the Revised Lancet Manuscript before publishing it. Clearly, however, the communicative product contained in the article The Lancet was about to publish was identical to the product the BJOG actually published, notwithstanding differences in the style of the prose. Similarly, none of the changes Buhimschi made to the Lancet Manuscript before resubmitting it to The Lancet as the Revised Lancet Manuscript altered the communicative product ultimately published in the BJOG in any way. Buhimschi merely repackaged the communicative product, and relabeled it to create confusion within the scientific community as to where the work was done and by whom.

Thus, Romero actually co-produced the communicative product published in the BJOG, and did not merely contribute ideas to it or make contributions that Buhimschi subsequently altered in any way. Given the importance of preserving the integrity of the scientific record to scientists and the advancement of knowledge, the Court should grant petition to decide whether the Lanham Act protects

the reputational interests of scientists in the research they have actually produced, as distinct from research to which they have contributed only ideas.

II. DEFAMATION CLAIMS.

The Court should also grant Petition to review the methods by which the Sixth Circuit decided a dispositive question of state law, and dismissed Petitioner's defamation claims on summary judgment, because they departed so far from well-settled procedures as to undermine the integrity of judicial proceedings, and call for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a). This Court has authority not only to correct errors of substantive law committed by the Court of Appeals, but also "to prescribe the method by which those courts go about deciding the cases before them". *See Lehman Brothers v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring). "By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." *See Hollingsworth v. Perry*, 130 S.Ct. 705, 713 (2010).

A. The Sixth Circuit failed to decide a question of Michigan law consistent with decisions of the Michigan Supreme Court.

The Sixth Circuit was required to decide whether Romero impliedly consented to Buhimschi's defamations as a matter of law as the Michigan Supreme Court would decide that question. *Baker v. General Motors Corp.*, 522 U.S. 222, 249 (1998); *Mullaney v. Wilbur*, 421 U. S. 684, 691 (1975). The Sixth Circuit was also required to decide that question

consistent with the Michigan Supreme Court's decision in *Dadd*, *supra*, rendered during the pendency of the appeal in this case. *See Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). Nevertheless, the Sixth Circuit disregarded these well-settled procedures, and ignored *Dadd* and other Michigan Supreme Court decisions.

In several early decisions, the Michigan Supreme Court repeatedly held that only a qualified privilege attached to statements that were "invited" or made in response to allegations of wrongdoing,[17] unless the plaintiff had herself published, or effectively published, the defamations.[18] App. 252a-257a. In *Smurthwaite*, 83 N.W. at 118, the court held that a person may not respond to an "attack" by making defamatory statements of a general nature or false statements with malice. Since consent creates an absolute privilege that bars a consenting party from recovering for injuries caused by consented to activities, *see Smith v. Calvary Christian Church*, 614 N.W.2d 590, 594 (Mich. 2000), these early decisions made it clear that the Michigan Supreme Court would

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[17] *Fortney v Stephan*, 213 N.W. 172, 173 (Mich. 1927) (absolute privilege does not attach to defamations about public officials that are "invited" if false statements are published with knowledge of falsity); *Schultz v. Guldenstein*, 106 N W 96, 97 (Mich. 1906) (defendant's response to a demand to know if he was alleging that a person stole his money is absolutely privileges only if the responses were "honest").

[18] *Shinglemeyer v. Wright*, 82 N.W. 887, 891 (Mich. 1900) (no difference between plaintiff soliciting a defamatory statement about herself, and reading out a defamatory statement in a letter she received, and for which she cannot recover).

not imply consent to defamations published with actual malice - the type of defamations at issue in this case - in response to allegations of wrongdoing, as a matter of law. This conclusion was reinforced by court's more recent affirmation of "society's 'pervasive and strong interest in preventing and redressing attacks upon reputation' caused by false and defamatory statements". *Locrichhio v. Evening News Ass'n*, 476 N.W.2d 112, 114 (Mich. 1991) (citation omitted).

Nevertheless, the Sixth Circuit disregarded these Michigan Supreme Court decisions, and, based entirely on unpublished cases and decisions that have no precedential value in Michigan, App. 25a, held that Romero impliedly consented to the defamations Buhimschi published about him with actual malice because he had "invited" these defamations. App. 22a-23a. Although the court justified reliance on these cases stating, "we find it difficult to ignore the similarity between these cases and Romero's case", App. 25a, none of the cases on which the court relied actually had facts analogous to Romero's case, none involved publications with actual malice, and none explicated the doctrine of implied consent, to justify reliance. *See* App. 257a-260a. The panel dismissed, *Smurthwaite*, the only Michigan Supreme Court case it considered, as having dubious precedential value in light of this Court's subsequent decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), App. 26a, notwithstanding that the Michigan Supreme Court re-affirmed *Smurthwaite*'s central holding in *Dadd*, *supra*. App. 255a-257a.

The facts of *Dadd* were directly analogous in all material respects to the facts of this case - i.e.

plaintiff's suit was based on defamatory statements the defendant published in response to allegations of wrongdoing by the plaintiff. *Dadd*, 780 N.W.2d at 764-65. *Dadd* held that under Michigan law only a qualified privilege attached to statements made in response to allegations of wrongdoing. *See* App. 256a-257a; *Dadd* at 763, 767-70. Therefore, *Dadd* made it clear that Michigan's law of consent had not changed since *Smurthwaite* was decided. *See* App. 256a-257a. Nevertheless, the appellate panel disregarded this Court's directive that federal courts must decide questions of state law consistent with intervening decisions of the state's highest court, *see Huddleston*, *supra* at 236; *Vandenbark*, *supra* at 543, and did not even mention *Dadd* in its opinion. App. 20a-28a.

B. The Sixth Circuit failed to decide a question of Michigan law consistent with Sixth Circuit precedent.

The appellate panel was also required to follow interpretations of state law of a prior panel unless the court took the case en banc or an intervening decision by the state's highest court indicated that it would decide the question of state law differently. *See Rutherford v. CLMBA Gas*, 575 F.3d 616, 619 (6th Cir. 2009). The appellate panel disregarded this procedural rule as well, and ignored a prior panel's interpretation of Michigan law that consent will not be implied to the publication of defamatory statements where the plaintiff has made his or her disagreement with the statements known to the defendant. *See Compuware v. Moody's*, 499 F.3d 520, 526 (6th Cir. 2007).

In this case, Romero made his disagreement with several defamatory statements in Buhimschi's Appeal

Letter known to Buhimschi and Yale officials before they were published in her Appeal Letter through, *inter alia*, his discussions with Naftolin in July/August, 2003, Docket No. 120, ¶ 19, 20, and his October 14, 2003 letter on which Romero copied Lockwood. App. 220a, ¶ 3; App. 245a-246a. Nevertheless, the panel disregarded these facts, ignored *Compuware* altogether, notwithstanding that it was briefed extensively, App. 245a-248a, and held that Romero impliedly consented to the publication of every false defamation Buhimschi had published about him with actual malice. *See e.g.* App. 261a-264a.

C. The Sixth Circuit refused to correct omissions and misstatements or material facts that distorted the record.

The courts below also disregarded well-settled procedures to decide whether Romero consented to Buhimschi's defamations as a matter of fact. Unless consent is implied as a matter of law by the law of the forum, consent, and the scope of consent, are questions of fact to be determined from the totality of the circumstances by a jury unless reasonable minds could not differ as to whether the plaintiff consented to the activity about which he or she has complained. *See Lewis v. Legow*, 670 N.W.2d 675, 688-89 (Mich. App. 2003) (extent of consent depends on the facts and circumstances of the case); *accord* Restatement (Second) of Torts, § 583, cmt c. Far from considering the totality of the circumstances, and viewing them in a light most favorable to Romero as they were required to do, *Dalley v. Gossett*, 788 N.W.2d 679, 690 (Mich.App. 2010), the courts below disregarded the obligations that flowed from WSU's contract with NICHD and 42 C.F.R. § 50.103, and misstated both

material facts and the chronology of events to justify finding consent in this case.

To obfuscate the fact that Buhimschi's incorrigibility caused WSU to invoke its Policy and Procedures on Scientific Misconduct, the district court asserted that "it was Romero who invoked Wayne State disciplinary proceedings to which Buhimschi's original appeal letter was a response", App. 53a, ¶ 3, and that "Buhimschi participated in the ensuing scientific misconduct investigation in a limited way ...[because] *while the investigation was ongoing*, she and her husband were in the process of moving to Yale". App. 45a, ¶ 2 (italics added). These statements were not true.

The record before the court made it clear that WSU invoked its Policy and Procedures, and opened an inquiry on June 12, 2003, App. 205a, ¶ 8, because Buhimschi refused to cooperate with Stinson's informal attempts to resolve the problem Buhimschi had created, App. 204a, ¶ 3 & 4, and not because Romero asked WSU to invoke its disciplinary procedures. App. 219a, ¶ 2. On the contrary, when Romero notified WSU officials of Buhimschi's actions, he expressed the hope that the matter could be resolved *without* WSU having to invoke its Policy and Procedures on Scientific Misconduct. *Id.*, *accord* App. 204a, ¶ 3. In fact, Romero was instructed *not* to direct Wayne State University in the handling of this matter. App. 219a, ¶ 2.

Once Buhimschi refused to cooperate, WSU was *obligated* to invoke its Policy and Procedures on Scientific Misconduct in response to Buhimschi's actions by the terms of its service contract with

NICHD. App. 163a, ¶ 5. App 165a. NICHD insisted on this condition to protect the Branch, App. 219, ¶ 2, based on the Branch's previous experience at Georgetown. App. 163a, ¶ 4. Romero agreed to act as a complainant on June 30, 2003, App. 210a-211a, after WSU had already invoked its Policy and Procedures on June 12, 2003, App. 205a, ¶ 8, and only because he was instructed to do so by NIH attorneys. App. 210a-211a. Malone and Sokol joined as complainants. App. 206a, ¶ 12. These actions had nothing to do with protecting Romero's reputation, App. 214a, ¶ 8, as the court opined. App. 54a.

Buhimschi's refusal to cooperate with Stinson's informal "pre-inquiry", and the subsequent inquiry to determine if there was sufficient evidence to open an investigation, occurred during June, 2003, *before* Buhimschi resigned from WSU (on June 26, 2003) and moved to Yale. App. 204a-205a. The *investigation* into allegations of scientific misconduct commenced on September 3, 2003, App. 208a-209a - *two months after* Buhimschi moved to Yale - and the hearing into the allegations of scientific misconduct was held on January 26, 2004, App. 153a, more than *six months after* Buhimschi moved to Yale. Buhimschi failed to cooperate with the investigation, failed to attend the hearing, App. 154a, even though WSU offered to pay her and her husband's travel expenses, Docket No. 39-#12 at 14, and failed to provide any of the documents or information the WSU-IC had requested. App. 153a-154a. Manifestly, Buhimschi was *at* Yale, throughout the time "the investigation was ongoing", and her move to Yale had nothing whatsoever to do with her total refusal to cooperate with the pre-inquiry, inquiry or the investigation.

To portray Buhimschi's defamations as "invited" by Romero, the district court's opinion further distorted the chronology of events by characterizing Buhimschi's defamations as simply responses to earlier accounts of the same events by Romero to "various fora". App. 44a-45a. The record, however, indicated that Buhimschi published her defamations proactively to "various fora" either to justify her misconduct, as in the case of Yale, App. 159a-160a, or to secure publication of the Revised Lancet Manuscript without including Romero or other PRB members, as in the case of the BJOG, App 238a; Docket No. 35-#5, *before* Romero was ever aware of her publications.

Buhimschi actually chose *not* to respond to the allegations of scientific misconduct with her version of events in the only forum that mattered, and the only one in which she was authorized by WSU's Policy and Procedures to respond - the hearing before the WSU-IC. App. 154a.[19] Nevertheless, the district court implied that the opposite was true by holding that "no reasonable jury could find that Romero did not invite not only Buhimschi's attempts to clear her name before the Wayne State committee, but presentation of her side of the story to Yale and to the BJOG." App. 54a.

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[19] Buhimschi's Appeal Letter was also not a response to Romero's *allegations* of scientific misconduct, or any other solicitation Thornton did not ask Buhimschi to respond to Oliver's letter of January 31, 2005. Thornton merely asked Buhimschi for permission to give WSU officials copies of her earlier correspondence with the BJOG. App. 238a (last para). Buhimschi had already published her version of events through Weiner's email. *Id.* (acknowledging possession of Weiner's email from October 10, 2003)

Far from correcting these and other distortions of the record, *see* App. 240a-244a, the Sixth Circuit compounded them. *See* App. 250a-251a. For example, the court stated, "In spite of Romero's protests, the BJOG published the manuscript, without giving credit to Romero or his team at Wayne State University, in early 2005". App. 6a. This statement was false. The BJOG had expressly stated that it had "neither the ability nor the obligation to investigate the authorship of every manuscript submitted." App. 224a.

Wayne State - not Romero - first "protested" the publication of the BJOG article on January 31, 2005, App. 234a-236a, seven and a half months after the BJOG had already accepted the article for publication (on June 16, 2004). App. 196a. By the time Oliver wrote to Thornton on January 31, 2005, the BJOG had already published the article electronically (on November 11, 2004), App. 229a-230a, and Yale had already issued its press release (on January 26, 2005) to announce the forthcoming publication of the article in the February, 2005 issue of the BJOG. App. 231a-233a. Romero had no contact with the BJOG until July, 2005, five months after the BJOG had already published the article in "hard copy". Docket No. 39-#13 (Romero's July 13, 2005 letter to Thornton).

D. The processes used by the courts below should be rejected to preserve public confidence in the legal system.

The processes used below to decide a question of state law, and dismiss Romero's defamation claims on summary judgment, are inconsistent with "the law's insistence on neutrality and fidelity to principle", *see Hollingsworth*, *supra* at 713, and, if allowed to stand,

will erode public confidence in our legal system because they cannot be concealed from the public in an age of electronic court records and the Internet.

> "Public confidence in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to the public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate."

See Grutter v. Bollinger, 288 F.3d 732, 815 (6th Cir. 2002) *aff'd* 539 U.S. 306 (2003) (Batchelden, J., dissenting). This Court should exercise its supervisory power, and reprove these methods to vindicate the rule of law.[20]

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[20] *See generally*, Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DePaul L. Rev. 469 (2006-2007)

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1195

[Filed September 13, 2010]

ROBERTO ROMERO, M.D.,

Plaintiff-Appellant,

IRINA BUHIMSCHI, M.D.; YALE UNIVERSITY,

Defendants-Appellees,

and

CARL WEINER, M.D.; ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS; JOHN DOE, A-G,

Defendants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: NORRIS, MOORE, and McKEAGUE, Circuit Judges.

McKeague, Circuit Judge. Roberto Romero, M.D., filed suit in federal district court against numerous defendants in connection with the publication of a manuscript in the *British Journal of Obstetrics and Gynaecology*. The portion of the suit relevant to this appeal involves Irina Buhimschi, M.D., the primary author of the manuscript, and her employer Yale University. Romero alleged that both Buhimschi and Yale defamed him through statements made about his contribution to the manuscript and his involvement in other research. Romero also alleged that Buhimschi breached an implied contract when she published the manuscript without listing Romero as a co-author. Finally, Romero alleged that both Buhimschi and Yale violated the Lanham Act by failing to acknowledge that Romero had contributed to the research underlying the manuscript. The district court dismissed the Lanham Act claim and granted summary judgment in favor of the defendants on the defamation and contract claims. Romero now appeals these decisions. After carefully considering Romero's arguments, we AFFIRM the decisions of the district court.

I.

Roberto Romero is a physician with a sub-speciality in maternal-fetal medicine and works as chief of the Perinatology Research Branch of the National Institute of Child Health and Human Development. Romero also holds a tenure position with the National

Institute of Health ("NIH"). At the time relevant to this litigation, Romero was a full-time employee with the federal government; he held no outside employment. Though he was employed directly by the federal government, Romero's position was part of a contract awarded to Wayne State University whereby the NIH provided funds and advice to Wayne Sate University. Romero served as the project officer under the contract, which required him to provide technical direction, review performance, provide advice, and review invoices. In addition to his duties as a project officer, Romero had duties associated with his role as branch chief of the Perinatology Research Branch. Specifically, Romero developed a research plan for the Perinatology Research Branch, developed scientific projects, mentored faculty and fellows, drafted manuscripts, and evaluated projects. These research and drafting activities were part of Romero's federal job responsibilities.

Irina Buhimschi, M.D., was recruited by Wayne State University in late 2000 to work as an assistant professor in the Division of Maternal-Fetal Medicine. Buhimschi was employed directly by Wayne State University and not the federal government. At the time she was recruited, Buhimschi and Romero discussed the possibility of collaborating on research together. Romero admits that this collaboration with Buhimschi was part of his federal job responsibilities. However, he nonetheless alleges that an implied-in-fact contract existed between himself and Buhimschi beginning in March of 2002, whereby the two would collaborate on research. According to Romero, the terms of this contract specified that Buhimschi would run the experiment while Romero would assist with experimental design, provide

comments, and aid with the preparation of a manuscript. In addition, Buhimschi would include Romero as a co-author on any article for which Romero met authorship criteria.

Romero began collaborating with Buhimschi before she arrived at Wayne State University. The initial collaboration included working with Buhimschi to conduct blood analysis for the presence of a specific enzyme and providing reagents, antibodies, and standards. Romero and other individuals at the Perinatology Research Branch continued to collaborate with Buhimschi during her time at Wayne State University. Specifically, Romero and another physician designed the criteria for the second phase of the study. Romero also suggested that Buhimschi submit the manuscript to *The Lancet*, a medical journal. The manuscript included work on which Romero had collaborated, and Romero was listed as a co-author on the submission. Soon after the manuscript was submitted, Romero's relationship with Buhimschi took a turn for the worse. Communication between the two became almost non-existent. During this time Buhimschi also relocated to Yale University.

Romero then became aware that Buhimschi had removed his name as a co-author on *The Lancet* manuscript. At this point, Romero wrote a letter to the vice president of Wayne State University, and a formal complaint was filed with the university regarding the removal of Romero and other contributors' names. In response to the complaint, the university held a hearing into whether Buhimschi had committed scientific misconduct, and Romero testified at this hearing. In addition to his Wayne State complaint, Romero also discussed the matter with *The Lancet*,

which prompted the journal to decline publishing the piece. Romero then became concerned that Buhimschi would seek to publish the manuscript in a different journal, so he urged Wayne State University to prepare a plan of action to respond to this possibility. He also notified Wayne State that if Buhimschi published the manuscript without proper authorship credit, the publication could create a problem with the contract between the Perinatology Research Branch and Wayne State University.

The investigative committee at Wayne State issued a report of its findings in 2004. The report concluded that Buhimschi had committed misconduct on two of the counts but that there was insufficient evidence as to one of the counts. Romero objected to the committee's findings on this last count, and he attempted to forward additional evidence to the committee in an effort to change the committee's findings. Romero also objected to the committee's recommended remedy, which included providing a two year period of oversight of Buhimschi's publications. After learning of the committee's findings, Buhimschi appealed the decision in a letter dated January 20, 2005. Further, in accordance with Wayne State policy, Yale University was notified of the committee's findings, though Yale declined to take action until Wayne State considered Buhimschi's appeal.

At around this same time, Romero became aware that the *British Journal of Obstetrics and Gynaecology* ("BJOG") intended to publish a modified version of the manuscript; a version which did not include Romero as a co-author. Romero then notified officials at Wayne State University and suggested that the university contact BJOG about the authorship dispute. He

continued to follow up with Wayne State officials about their contact with BJOG, and he assisted Wayne State officials in their communications with BJOG staff by comparing *The Lancet* manuscript with the BJOG manuscript. In correspondence between BJOG and Wayne State officials, BJOG staff indicated that they were aware of the authorship dispute and that they had been in contact with Buhimschi. BJOG officials stated that they intended to publish a correction if it was later found that Romero deserved authorship credit.

Through communications with BJOG staff, Romero also became aware of a thirty-one page appeal letter that Buhimschi had sent to the Wayne State University investigative committee. In the letter, Buhimschi denied wrongdoing and criticized Romero and Wayne State University. Buhimschi also sent this letter to BJOG, which in turn provided a copy to Romero. This letter forms part of Romero's defamation claim against Buhimschi and Yale University. Romero contends that this letter contains twenty-nine separate defamatory statements.

In spite of Romero's protests, BJOG published the manuscript, without giving credit to Romero or his team at Wayne State University, in early 2005. Immediately thereafter, Yale University issued a press release crediting Yale researchers and a Yale team with the results of the research. The press release did not contain any mention of Romero or researchers at Wayne State University. This press release, along with the manuscript itself, forms the basis of Romero's Lanham Act claim.

In the meantime, Wayne State University denied Buhimschi's appeal from its finding of scientific misconduct on February 16, 2005, which prompted Yale to appoint an ad hoc committee to evaluate the matter. In connection with Yale's ad hoc committee investigation, Buhimschi supplied Yale officials with an email sent by her former supervisor Carl Weiner, M.D., to BJOG staff regarding her submission of the manuscript. In the email, Weiner described the background of the research and manuscript and explained his position that Romero was not involved with the research in a manner that entitled him to authorship credit. Buhimschi's republication of this email to a deputy general counsel at Yale University forms a second portion of Romero's defamation claim. Also in connection with the Yale ad hoc committee, Lawrence Cohen, M.D., an Integrity Officer at Yale University, sent a letter to committee members providing background information on the dispute and giving the committee instructions. This letter forms the final portion of Romero's defamation claim.

Romero was apparently dissatisfied with the outcome of the investigations at Wayne State University and Yale University, and he filed the instant action in federal district court in February 2006. An amended complaint was filed in June 2006, which contained seven counts of wrongdoing against eleven named and unnamed defendants. Of the seven counts and eleven defendants, only two defendants and three counts are relevant to this appeal. Specifically, this appeal involves: (1) Romero's claim of violation of the Lanham Act against Buhimschi and Yale; (2) Romero's claim of breach of an implied-in-fact contract against Buhimschi; and (3) Romero's claim of defamation against Buhimschi and Yale. These claims

were disposed of in the district court under different procedural postures.

Specifically as to the Lanham Act claim, both Yale and Buhimschi filed motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The motions were premised on the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). A magistrate judge evaluated the motions and issued a report and recommendation stating that the Lanham Act claim was barred by *Dastar*, and the district court adopted this recommendation. As to the contract and defamation claims, discovery moved forward and both Yale and Buhimschi filed motions for summary judgment. The district court granted summary judgment in favor of Yale and Buhimschi on these claims, finding that the contract claim failed because Romero had a preexisting duty to perform the contract and the defamation claim failed because Romero impliedly consented to the defamations through his initiation of the investigation. Romero appeals this decision along with the dismissal of the Lanham Act claim.[1]

---

[1] Romero has also filed a motion to expand the record on appeal and seeks to include seventeen additional exhibits that the district court struck from the record in evaluating his motion for reconsideration. Because Romero has failed to argue any of the equitable factors for expanding the record on appeal, we deny this motion. *See United States v. Murdock*, 398 F.3d 491, 500 (6th Cir. 2005).

II.

We begin by addressing our jurisdiction over the issues presented in this appeal. The district court possessed subject matter jurisdiction over the Lanham Act claim pursuant to 28 U.S.C. § 1331. It possessed diversity jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1332 because all of the parties were diverse and Romero alleged an amount-in-controversy greater than $75,000. We possess jurisdiction over final decisions of the district court pursuant to 28 U.S.C. § 1291.

III.

In evaluating Romero's Lanham Act claim, we review de novo the district court's dismissal under Rule 12(b)(6). *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 608–09 (6th Cir. 2009). "[T]o survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.'" *Id.* at 609 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This burden is met if the pleadings contain sufficient factual content to allow the court to infer liability for the alleged misconduct. *Id.*

The Lanham Act creates a civil cause of action in favor of any person who is injured by false designations of origin or false descriptions. 15 U.S.C.A. § 1125(a). Section 43 of the Act states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name,

> symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which–
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action . . . .

Id. This section of the Lanham Act provides broad federal remedies beyond simple trademark protection. *Dastar*, 539 U.S. at 29.

The Supreme Court interpreted this section in *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. at 25. Specifically, the Court addressed "whether § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), prevents the unaccredited copying of a work . . . ." *Id.* In *Dastar*, Twentieth Century Fox sued Dastar under a theory of reverse passing off[2] for Dastar's sale of a video series on General Eisenhower's crusade through Europe. *Id.* at 26–27. To make the series, Dastar purchased beta cam tapes of a 1949 series, which Fox owned the rights to but had let the copyright expire.

---

[2] Reverse passing off (also known as palming off) occurs when a party misrepresents someone else's goods or services as his own. *Dastar*, 539 U.S. at 27, n.1.

Id. Dastar then edited the series by changing the opening and closing sequence, inserting new titles, rearranging the "recap" section, and removing references to a corresponding book. *Id.* Dastar advertised its series as being produced and distributed by a Dastar-owned company and included a credit line "DASTAR CORP presents." *Id.* at 27. The Dastar series made no reference to the original series owned by Fox. *Id.*

In determining whether Dastar's actions violated the Lanham Act, the Supreme Court focused its inquiry on the meaning of origin of goods in § 43(a)(1)(A). *Id.* at 31. The Court stated that "origin of goods" could not mean "the person or entity originating the ideas or communications" because such a meaning would stretch the text and purpose of the Lanham Act. *Id.* at 32. Under *Dastar*, the Lanham Act can not be read to encompass communicative products, whose origins have little consequence to purchasers, because this reading would conflict with copyright law and would render portions of that body of law superfluous. *Id.* at 33–35. "Reading 'origin' in § 43(a) to require attribution of uncopyrighted materials would pose serious practical problems." *Id.* at 35. Thus, the Court held that the Lanham Act did not create a cause of action for behavior that amounted to plagiarism or the use of unprotected work without attribution. *Id.* at 36. However, the Court left open the possibility that a cause of action could exist under the misrepresentation prong of § 43(a)(1)(B). *Id.* at 38. Specifically, if Dastar had given purchasers the impression through advertising or promotion that its series was substantially different from the series on which it was based, Fox could have stated a claim under § 43(a)(1)(B). *Id.*

This court has applied *Dastar* and held that the use of educational materials, including workbooks and audiotapes, without proper attribution did not violate the Lanham Act because "taking the intellectual property contained in [] goods and incorporating it into your own goods does not" constitute a violation. *Nat'l Bus. Dev. Servs. v. Am. Credit Educ. & Consulting Inc.*, 299 F. App'x 509, 511 (6th Cir. 2008). Similarly, the First Circuit held that a claim for failing to attribute authorship credit on a college textbook did not create a cause of action under the "false origin" section of the Lanham Act. *Zyla v. Wadsworth*, 360 F.3d 243, 252 (1st Cir. 2004). The *Zyla* court nevertheless noted that "[t]he Court in *Dastar* left open the possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)'s prohibition on false advertising." *Id.* at 252 n.8.

Other Circuits have noted that *Dastar*'s holding was limited to § 43(a)(1)(A), but have rejected the claim that false designation of authorship or licensing is actionable under § 43(a)(1)(B). *See, e.g.*, *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009); *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008). In *Baden Sports*, the Federal Circuit applied Ninth Circuit law and rejected an argument that Molten, a manufacturer of basketballs, violated § 43(a)(1)(B) by advertising that dual cushion technology was a "Molten innovation." *Id.* at 1302–03, 1305. The "Molten innovation" claim was false because another basketball manufacturer had developed the technology. *Id.* at 1302–03. However, the Federal Circuit held that the claim was not actionable because the "Molten innovation" advertising materials did not concern the

"origin of goods" prong under § 43(a)(1)(A) nor did the materials concern the "nature, characteristics, [or] qualities" prong under § 43(a)(1)(B). *Id.* at 1305. According to the Federal Circuit, "nature, characteristics, and qualities" under § 43(a)(1)(B) refers to the characteristics of the good itself, rather than authorship designation. *Id.* at 1307. To read the Lanham Act otherwise would put it in conflict with patent and copyright law. *Id.*

In this case, Count I of Romero's complaint alleges violation of the Lanham Act by reverse palming off. The count specifically alleges that: (1) Buhimschi passed off research and results as findings by "Yale researchers" rather than collaboration with a Wayne State team; (2) Buhimschi and Yale misrepresented the research and findings in the BJOG article as being conducted at Yale by Yale faculty; (3) Buhimschi and Yale issued a press release that attributed the work to Yale researchers and a "Yale team" but failed to identify the names of collaborators; and (4) the article contained false and misleading statements about where and how the research was conducted and funded. The complaint alleged that these representations misled the scientific community as to the origin of the research. In the complaint, this claim was titled "Reverse Palming Off," yet it did not cite any specific provision of the Lanham Act. In evaluating the defendants' motion to dismiss, both the magistrate judge and the district court held that Count I failed to state a claim under *Dastar*, without evaluating whether Romero stated a claim under § 43(a)(1)(B) of the Lanham Act. *Romero v. Buhimschi*, 2:06-cv-10859 at 4 (E.D. Mich. Sept. 28, 2007); *Romero v. Buhimschi*, 2:06-cv-10859 at 7–11 (E.D. Mich. May 22, 2007).

To the extent that Romero's claim relies on § 43(a)(1)(A)'s "origin of goods" prong, the claim clearly falls within the scope of *Dastar*. Aside from the fact that *Dastar* involved a video and this case involves a manuscript, the cases are nearly identical because both plaintiffs alleged that the defendants used portions of the plaintiffs' work but failed to attribute the work to the plaintiffs. And the Court in *Dastar* made clear that origin did not refer to the person originating the idea and could not be read to apply to communicative products. 539 U.S. at 32, 35. Thus, Romero's Lanham Act claim fails in as much as it alleges that Buhimschi and Yale failed to credit Romero's work in the manuscript. However, at least one Circuit has left open the possibility that a claim can be made for misrepresenting authorship in promotional material or advertisements under § 43(a)(1)(B). *See Zyla*, 360 F.3d at 252 n.8. And at least a portion of Romero's pleadings allege that Yale violated the Lanham Act through its press release.

Assuming that a portion of Romero's pleadings could fall under § 43(a)(1)(B)'s advertising prong, the misconduct alleged in the pleadings would have to relate to the "nature, characteristics, qualities, or geographic origin" of the manuscript. 15 U.S.C.A. § 1125(a). The Federal Circuit's decision in *Baden Sports* provides guidance on this issue because that court held that false advertising materials, which claimed that basketball technology was a "Molten innovation," did not go to the nature, characteristics, or qualities of basketballs, but instead related to authorship of the technology. 556 F.3d at 1305. Similarly, any advertising or promotional claim by Yale or Buhimschi that attributed the research to a "Yale team" or "Yale researchers" appears to be related

to authorship, rather than the nature, characteristics, or qualities of the research. Further, Romero's claim in this case does not fit within the Supreme Court's dicta in *Dastar*, which left open the possibility for claims to be brought under § 43(a)(1)(B). Instead, comparing Romero's pleadings with the allegations in *Dastar*, Romero's claim closely tracks the claims made in that case. We therefore hold that the district court properly dismissed the Lanham Act claim.

IV.

We now turn to Romero's state-law claims, allegingbreach of contract and defamation. This court reviews a district court's grant of summary judgment de novo. *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 264 (6th Cir. 2010). "Summary judgment is appropriate when 'the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact' regarding any essential element of the non-moving party's case and the moving party is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(c)). A claim lacks a genuine issue of material fact if no reasonable jury could return a verdict in favor of the nonmoving party. *Id.* Michigan substantive law applies to both the contract claim and the defamation claim. *See Gass v. Marriott Hotel Servs.*, 558 F.3d 419, 425 (6th Cir. 2009); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 302 (6th Cir. 2008).

A.

Under Michigan law, consideration is an essential element of any contract. *Yerkovich v. AAA*, 610 N.W.2d

542, 546 (Mich. 2000). The preexisting duty rule states that a contract fails for lack of consideration where the party promises something that he is already legally bound to do. *46th Circuit Trial Court v. County of Crawford*, 719 N.W.2d 553, 568 (Mich. 2006). This rule applies whether the preexisting duty is based on statute or contract and whether the promise at issue is a modification to an existing agreement or whether it is a new agreement. *Kassab v. Dennis*, No. 283394, 2009 WL 763433 at *1 (Mich. Ct. App. Mar. 24, 2009). Michigan courts have applied this rule to nullify contracts in a variety of contexts. *See, e.g.*, *46th Circuit Trial Court*, 719 N.W.2d at 568 (finding no contract for county to provide a certain amount of funding to a court where the constitution required the county to provide "reasonable and necessary funds"); *Yerkovich*, 610 N.W.2d at 546 (finding subrogation agreement between insured and insurance company lacked consideration because the insurance company had a preexisting duty under the policy to pay plaintiff's medical expenses); *Pawlak v. Redox Corp.*, 453 N.W.2d 304, 307 (Mich. App. Ct. 1990) (per curiam) (finding no contract between city and decedent to transport decedent to hospital because the city had a statutorily imposed preexisting duty to provide service); *Freiburger v. State of Mich. Dep't of Mental Health*, 409 N.W.2d 821, 822 (Mich. Ct. App. 1987) (finding no contract between decedent and state-run medical clinic to provide appropriate care because medical clinic had a statutorily imposed duty to provide services).

In this case, Romero alleges that an implied-in-fact contract existed between himself and Buhimschi whereby Buhimschi would list Romero as a co-author in exchange for collaboration on the research. Romero further asserts that Buhimschi breached this contract

by publishing the manuscript in BJOG without including him as a co-author. In granting summary judgment in favor of Buhimschi, the district court determined that Romero's "entire collaboration with Buhimschi was within the scope of his [federal] employment." *Romero v. Buhimschi*, No. 2:06-cv-10859, 2009 WL 92226 at *6 (E.D. Mich. Jan. 14, 2009). Therefore, any contract failed for lack of consideration because Romero had a preexisting duty to collaborate with Buhimschi. *Id.* at 13. In deposition statements, Romero described his federal job duties as requiring him to mentor faculty and fellows, provide technical direction, review performance, provide advice, develop scientific projects, and draft manuscripts. Romero also explicitly stated that his federal job duties required him to collaborate with Buhimschi. Thus, the district court's conclusion is supported by the record.

Romero nonetheless argues that the district court erred for the following reasons: (1) under Michigan law the preexisting duty must be owed to the promisor and not a third party; (2) the National Institute of Child Health and Human Development expected Romero to enter into an authorship agreement with Buhimschi; and (3) even if no implied-in-fact contract existed, Romero is entitled to specific performance under equity principles. Beginning with Romero's first argument, his contention that the duty must be owed to the promisor is not supported by case law. Romero cites *Yerkovich*, 610 N.W.2d at 546, yet nothing in *Yerkovich* discusses whether the preexisting duty rule applies solely in the context of a promisor-promisee relationship. Romero also cites the *Restatement (Second) of Contracts* § 73, which notes in the comments that "the tendency of the law has been

simply to hold that performance of contractual duty can be consideration if the duty is not owed to the promisor." While this section might provide support for Romero's argument, there is no indication that Michigan courts have adopted it. Further, Romero's preexisting duty existed within the context of his federal employment. And both Michigan courts and the Restatement recognize that the performance of a preexisting duty is not consideration when the legal duty is owed by a public official. *See, e.g., 46th Circuit Trial Court*, 719 N.W.2d at 568 (finding no contract for county to provide a certain amount of funding to court where constitution required county to provide "reasonable and necessary funds"); *Restatement (Second) Contracts* § 73, cmt. b (stating that public duties cannot form legal consideration).

Romero also argues that National Institute of Child Health and Human Development expected him to enter into an authorship agreement with Buhimschi. To support his argument, Romero cites the NIH's Guidelines for the Conduct of Research, which highlights the importance of publishing scientific research and recommends open discussions on authorship. Romero attempts to elevate these guidelines into explicit authority to enter into a contract. However, this argument is unavailing because the document which Romero cites plainly states in the introduction that it "is not meant to codify a set of rules, but rather to elucidate, increase awareness and stimulate discussion . . . ." The advice in these guidelines, recommending that "authorship issues[] be discussed openly," simply does not form a legal basis on which to enforce an implied contract between Romero and Buhimschi, given that Romero had a preexisting duty to collaborate with Buhimschi.

Finally, Romero claims that he is entitled to specific performance under principles of equity or unjust enrichment.[3] Romero did not include this equity theory in his pleadings. Instead, in his response to Buhimschi's motion for summary judgment, Romero requested leave to amend his pleadings to include this theory. Romero then formally filed a motion to amend, which the district court denied in its order granting summary judgment in favor of Buhimschi and Yale. Thus, this issue is technically before us on review from the district court's denial of Romero's motion to amend his complaint. This court reviews a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008). "A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile." *Colvin v. Caruso*, 605 F.3d 282, 294 (6th Cir. 2010) (quoting *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995)). When the district court denies the motion on the basis of futility, we review the decision de novo. *Riverview Health Inst.v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

In denying Romero's motion, the district court simply stated that "[b]ecause the Court concludes that there was no consideration to support any contract between the parties, it will not consider . . . Romero's

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[3] Romero vaguely labels his claim as one for quasi-contract, without citing any specific Michigan case law. Under Michigan law, claims for implied-in-law contracts are labeled "quantum meruit" or "unjust enrichment." *Daimler-Chrysler Servs. N. Am. v. Summit Nat'l Inc.*, 289 F. App'x 916, 924–25 (6th Cir. 2008)

motion." *Romero*, 2009 WL 92226 at *4. The exact basis of this denial is not entirely clear to us. However, it appears to be based on futility, so we review the decision de novo. *See Riverview Health Inst.*, 601 F.3d at 512. To make a case for unjust enrichment, the plaintiff must not only show that the defendant received a benefit but that "the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for [the defendant] to retain it." *Dumas v. Auto Club Ins. Ass'n*, 473 N.W.2d 652, 663 (Mich. 1991) (quoting *Restatement Restitution* § 1, cmt. c). Romero's brief does not contend that it would be *unjust* for Buhimschi to retain the benefit of his collaboration, rather he simply urges the court to allow the amended complaint based on general equity principles. Because Romero has not provided a proper legal basis to reverse the district court's denial, we affirm the district court's decision.

B.

Finally, we review the district court's grant of summary judgment in favor of the defendants on the defamation claim. To establish a claim for defamation under Michigan law, a plaintiff must show "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of the special harm (defamation per se) or the existence of special harm caused by the publication." *Mitan v. Campbell*, 706 N.W.2d 420, 421 (Mich. 2005) (per curiam). Michigan courts have repeatedly recognized that a publication is absolutely privileged if the defamed party invited or consented to the publication. *See, e.g., Hieke v. Guevara*, No.

09-10427-BC, 2010 WL 538300 at *5 (E.D. Mich. Feb. 9 2010); *Ramsey v. Speedway SuperAmerica LLC*, No. 279034, 2008 WL 3541206 at *4–5 (Mich. Ct. App. Aug. 14, 2008); *Leftwich v. Lula Belle Stewart Ctrs.*, No. 270089, 2006 WL 3304190 at *2 (Mich. Ct. App. Nov. 14, 2006) (per curiam); *Jaafar v. Sabon*, No. 229992, 2002 WL 1482605 at *1 (Mich. Ct. App. July 9, 2002) (per curiam); *Med. Planning Consulting v. St. Mary's Med. Ctr.*, No.214018, 2000 WL 33418859 at *5 (Mich. Ct. App. June 13, 2000) (per curiam); *Hollowell v. Career Decisions, Inc.*, 298 N.W.2d 915, 922 (Mich. Ct. App. 1980); *Merritt v. Detroit Mem. Hosp.*, 265 N.W.2d 124, 127 (Mich. App. Ct. 1978); *Schechet v. Kesten*, 141 N.W.2d 641, 644 (Mich. Ct. App. 1966). The privilege can be both express or implied. *Ramsey*, 2008 WL 3541206 at *4 (quoting 50 *Am. Jur. 2d Libel & Slander* § 254). An absolutely privileged communication is not subject to a defamation claim even if the statement was false or malicious. *Oesterle v. Wallace*, 725 N.W.2d 470, 474 (Mich. Ct. App. 2006).

A Michigan appellate court has recognized the absolute privilege of consent in a case where the plaintiff's attorney sent a letter to the defendant threatening to file suit for breach of contract and requesting a response. *Med. Planning Consulting*, 2000 WL 33418859 at *2. The Michigan Court of Appeals determined that the plaintiff had invited the defamatory statements by sending the letter. *Id.* at *4–5. Both Michigan and federal courts have also applied the privilege of consent where defamatory publications weresent as part of a review or investigatory process. *See Heike*, 2010 WL 538300 at *5 (holding that plaintiff impliedly consented to defamation where defendant made statements to a school's appeals committee as part of an investigation

into whether the defendant-coach harassed the plaintiff-player); *Schechet*, 141 N.W.2d at 644 (holding that the privilege of consent applied to letters sent to a credentials committee at a hospital where the letters were sent as part of the hospital's review process for staff privileges).

In this case, Romero bases his defamation claim on three publications: (1) Buhimschi's republication to BJOG and Yale of her appeal letter originally sent to the Wayne State University investigative committee; (2) Buhimschi's republication to a deputy general counsel at Yale of Carl Weiner's emails to BJOG urging the journal to publish Buhimschi's manuscript; and (3) Lawrence Cohen's letter to members of the Yale ad hoc committee outlining the committee's duties. The district court determined that Romero invited, and thus consented to, the defamations by invoking Wayne State's investigative proceedings, by prompting Wayne State to notify BJOG of the authorship dispute, and by having a role in Yale forming its ad hoc committee to investigate the Wayne State findings.

A reading of the allegedly defamatory publications shows that the privilege of consent applies to Romero's defamation claim. Beginning with the first publication, consisting of Buhimschi's republication of her appeal letter to BJOG and Yale, Romero's own deposition testimony indicates that he urged Wayne State officials to contact BJOG about the authorship dispute. By prompting this contact with BJOG, Romero impliedly consented to Buhimschi's defense of her manuscript. *See Schechet*, 141 N.W.2d at 644. Moving to the second and third publications, both of these were sent in the context of Yale's investigation, after

that school learned of the findings by the Wayne State committee. In hisbrief, Romero admits that Wayne State officials notified Yale of its scientific misconduct findings, as was required by Wayne State policy, and that Yale appointed its own investigative committee after the investigation at Wayne State was complete. Further, Romero's own deposition testimony indicates that he initiated the investigatory proceedings at Wayne State University, which culminated in the findings being reported to Yale. Romero therefore impliedly consented to Buhimschi's response to Yale officials. *See Schechet*, 141 N.W.2d at 644.

Romero nevertheless argues that the publications were not absolutely privileged under Michigan law because the Michigan Supreme Court has not recognized consent as an absolute privilege. He relies on *Smutherwaite v. News Pub. Co.*, 83 N.W. 116 (Mich. 1900), to support his position. In *Smutherwaite*, the Michigan Supreme Court specifically recognized a privilege of "self-defense," which arises when a defendant answers charges against him. 83 N.W. at 119. The court found error in the trial court's jury instructions on this issue because the instruction did not limit the privilege based on malice and did not limit the privilege based on whether the statement was related to the charges. *Id.* While *Smutherwaite* might appear at first blush to provide support for Romero's position, a careful reading of the case shows that it does not.

To begin with, *Smutherwaite* does not appear to be addressing the same privilege asserted by Buhimschi and Yale in this case. While the trial court's instructions in *Smutherwaite* used the term "consent," the Michigan Supreme Court's decision discusses the

privilege as being one of "self defense." 83 N.W. at 119. It also describes the privilege as applying where "the occasion is one which justifies such publication," and states that defendants have a "qualified privilege" to respond to accusations. *Id.* Given that the case was published in 1900, the exact privilege at issue is difficult to ascertain. However, a careful reading of the opinion leads us to conclude that the *Smutherwaite* court addressed a qualified occasional privilege, rather than the privilege of consent.

Under the section on conditional privileges, the Restatement of Torts lists "occasions making a publication conditionally privileged" and further lists "protection of the publisher's interest" as a conditional privilege. *Restatement (Second) of Torts* § 594. A communication falls under this qualified occasional privilege if the circumstances surrounding the communication are such that a reasonable belief exists that the communication "affects a sufficiently important interest of the publisher" and "the recipient's knowledge of the defamatory matter will be of service in the lawful protection of this interest." *Id.* This occasional privilege is separate and distinct from the privilege of consent. Because the *Smutherwaite* court described the privilege as being one of "self defense" and used the words "occasion" and "qualified" in its analysis, we believe that the case addresses the qualified occasional privilege of protecting the publisher's interest, rather than the privilege of consent. Our reading of *Smutherwaite* is bolstered by the Michigan appellate courts' treatment of the privilege of consent.

While it is admittedly unclear whether the Michigan Supreme Court has addressed the privilege

of consent, Michigan appellate courts have clearly and consistently recognized that an invited or consented to communication is privileged.[4] Though the precedential value of these cases is somewhat weakened by their age or unpublished status, we find these cases difficult to ignore given their numbers. We also find it difficult to ignore these cases' explicit description of the privilege as being "absolute." *See, e.g.*, *Heike*, 2010WL538300at *5 (citing *Restatement (Second) of Torts* § 583); *Leftwich*, 2006 WL 3304190 at *2 ("A communication regarding a person is absolutely privileged if the person consents to the communication."); *Jafar*, 2002 WL 1482605 at *1 ("A communication regarding a person is absolutely privileged if the person who is the subject of the communication consented to it."); *Med. Planning Consulting*, 2000 WL 33418859 at *5 ("A communication regarding a person is absolutely privileged if the person consents to the communication."); *Hollowell*, 298 N.W.2d at 922 ("A communication regarding a person is absolutely privileged if it is consented to."); *Merritt*, 265 N.W.2d at 127 ("A communication regarding a person is absolutely privileged if he consents to it."); *Schechet*, 141 N.W.2d at 644 ("[T]he publication of false and defamatory matter of another is absolutely privileged if the other consents thereto."). Finally, we find it difficult to ignore the factual similarities between these cases and Romero's case. Because this is the

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[4] *See, e.g., Hieke*, 2010 WL 538300 at *5; *Ramsey*, 2008 WL 3541206 at *4–5; *Leftwich*, 2006 WL 3304190 at *2; *Jaafar*, 2002 WL 1482605 at *1; *Med Planning Consulting*, 2000 WL 33418859 at *5, *Hollowell*, 298 N.W.2d at 922, *Merritt*, 265 N.W.2d at127; *Schechet*, 141 N W 2d at 644.

body of case law on which Yaleand Buhimschi rely, we find it controlling.

Moreover, none of the Michigan appellate court decisions listed above cites *Smutherwaite*, which further supports our conclusion that *Smutherwaite* did not address the privilege of consent but instead addressed a qualified occasional privilege.[5] And if we were to reverse the district court under the auspices of *Smutherwaite*, we would be ignoring this large body of Michigan case law that recognizes an absolute privilege of consent. We would further be implying that all of these Michigan appellate cases were wrongly decided under *Smutherwaite*. Notwithstanding this large body of Michigan appellate court decisions, Romero makes persuasive arguments as to how he believes the Michigan Supreme Court would evaluate the privilege of consent. However, his arguments are nothing more than his own speculations. And we should look to the decisions of the intermediate appellate courts unless we are convinced that the state supreme court would decide the issue differently. *Mike's Train House, Inc. v. Lionell, LLC*, 472 F.3d 398, 413 (6th Cir. 2006). We therefore find the decisions of the Michigan appellate courts, recognizing an absolute privilege of consent, controlling in this case.

Additionally, we believe that it would be problematic to rely on *Smutherwaite* given its age and

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[5] In *Merritt*, the Michigan appellate court applied a qualified occasional privilege to some of the defendants' defamatory publications and applied an absolute consent privilege to other publications. 265 N.W.2d at 127. This opinion, therefore, indicates that these are in fact separate privileges under Michigan law.

developments that have occurred in defamation law since the decision. *Smutherwaite* involved defamatory statements published in a newspaper in the context of an election. 83 N.W. at 117. The case was decided long before the Supreme Court's seminal decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). While *Smutherwaite*'s analysis on common-law privileges might remain good law, the holding is questionable under *Sullivan*. Its precedential value is therefore dubious. Further, we note that *Smutherwaite* has only been cited five times in its 110-year history, four of which occurred prior to 1916. We therefore do not believe that it controls the outcome of this case.

Romero offers one final argument in support of his position. He argues that even if the privilege of consent is absolute under Michigan law, the defendants in the present case exceeded the scope of any consent. Michigan courts have noted that the consent privilege applies to those statements relevant to the purpose for which consent was given and to those persons with a legitimate interest in their content. *Ramsey*, 2008 WL3541206 at * 4 (quoting 50 *Am. Jur. 2d Libel & Slander* § 254). It is clear that Buhimschi, as well as the parties to which she published the statements, had a legitimate interest in the content of the statements. Further, it is also clear from Romero's pleadings and a reading of the statements themselves that all of the allegedly defamatory statements were relevant to the purpose for which the consent was given. Specifically, all of the statements concerned Buhimschi's reasons for originally including Romero as a co-author, her reasons for removing Romero as a co-author, her views on Wayne State's investigatory process, and her version of Romero's contributions to the research. While Romero might dispute the veracity of these

statements, absolute privileges apply regardless of whether the statements are false or malicious. *Oesterle*, 725 N.W.2d at 474. We therefore hold that defamatory statements are privileged under Michigan law.

V.

For the foregoing reasons, we AFFIRM the district court's dismissal of the Lanham Act claim and grant of summary judgment in favor of the defendants on the contract and defamation claims. We also DENY Romero's motion to expand the record on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:06-cv-10859

[Filed January 14, 2009]

ROBERTO ROMERO,	)
	)
Plaintiff,	)
	)
v.	)
	)
IRINA BUHIMSCHI and YALE UNIVERSITY,	)
	)
Defendants.	)
	)

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (docket nos. 95 & 97) **AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** (docket no. 90)

INTRODUCTION

Despite the number of controversies in that result in litigation, there remain some disputes that fall outside the realm of the courts, and wrongs that are not redressable by law or equity. This case involves such a dispute, and if any wrong was committed here, its proper remedy should be sought outside of the courthouse.

This suit is, at its core, a dispute over the attribution of authorship of certain medical research, and of scholarly articles and presentations publishing that research. The plaintiff Dr. Roberto Romero claims that one of the defendants, Dr. Irina Buhimschi, published medical research on which they had collaborated without attributing authorship to Romero. This publication, he says, was a breach of an implicit contract between the two of them, whereby he would collaborate on the research and she would attribute authorship to him. Romero also claims that after he complained of this to various academic and scholarly institutions, Buhimschi and her employer, Yale University, responded with a series of libelous accusations.[1]

Although Romero's contract and defamation claims are related to each other, they involve fairly discrete sets of facts, each of which is relatively complex.

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[1] Romero's complaint also included claims of Lanham Act violations, negligence, and tortious interference with advantageous relations, as well as additional defendants. These counts and defendants have all been dismissed, docket no. 61, leaving only the contract claim against Buhimschi and the defamation claims against Buhimschi and Yale.

Therefore, the Court will discuss the facts related to each claim separately.

CONTRACT CLAIM

I. Facts

The facts of the case are disputed at many points, but the parties appear to agree on the basics. The plaintiff, Dr. Roberto Romero, was and is the Chief of the Perinatology Research Branch of the National institute of Child Health and Human Development (hereinafter "the PRB"), which at all relevant times was housed at Wayne State University in Detroit. Although this housing arrangement was temporary and informal at first, in October 2002 Wayne State was awarded a multimillion-dollar contract to be the long-term home of the PRB.

Romero has no written employment contract with the PRB, but the record indicates that his employment is designated as being of "indefinite" duration, and he has been granted tenure of a type similar to that used by universities. Romero dep., docket no. 95, ex. A, p. 11. According to Romero, his job duties include "participat[ion] in the drafting of manuscripts, abstracts, and other scientific endeavors of that nature." *Id.* p. 20. He is "involved in the scientific process on a daily basis," *id.* p. 21, and estimates that "at least" half his time is spent planning research, participating in projects, editing manuscripts, and doing other science – "[a]nd if I were to include weekends and nights, probably that would exceed that number." *Id.*

Between 2001 and 2003, defendant Dr. Irina Buhimschi was an assistant professor in Wayne State's school of medicine. She took that position after Romero recruited her to collaborate with the PRB.[2] Buhimschi's husband also became involved in medical research at Wayne State. Some time after her arrival at Wayne State, Buhimschi began formally working for the PRB under a contract created pursuant to the Intergovernmental Personnel Act of 1970. Under this arrangement, Buhimschi split her time evenly between Wayne State and the PRB, but was not added to the PRB's payroll; instead Wayne State paid Buhimschi's salary and the PRB compensated Wayne State for her services. Romero acknowledges that his collaboration with Buhimschi was part of his job responsibilities. Romero dep., docket no. 95, ex. A, p. 21.

It was out of this relationship between Buhimschi and the PRB that the disputed research arose. This research used an approach known as "proteomics," in which researchers study the entire assortment of proteins present in a tissue or body fluid, in hopes of identifying specific proteins or sets of proteins that only appear along with a given kind of medical condition. If such a set of proteins is discovered, those proteins can be regarded as "biomarkers" of the condition. In the research in question, Buhimschi was attempting to discover proteomic biomarkers of inflammation or infection in the amniotic fluid of pregnant women, conditions that often lead to preterm

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[2] When Buhimschi arrived at Wayne State it had not yet won the long-term contract to house the PRB Romero indicated to Buhimschi that if the PRB awarded the contract to some other institution, he would be interested in having her move along with the PRB.

delivery.[3] To do so, Buhimschi and her collaborators used a form of mass spectrometry known as SELDI[4] to identify the proteomic profiles of various samples of amniotic fluid, some of which were inflamed or infected and others of which were uninflamed and uninfected "control" samples. The initial phase of their study revealed a set of four proteins that, in combination, were always present in inflamed or infected amniotic fluid, and never in the control samples. In the second phase of the study Buhimschi and the other researchers tested this conclusion by blinding themselves to whether the fluid samples they were studying were inflamed or infected, and attempting to diagnose inflammation or infection based solely on the presence of the protein biomarkers they had previously identified. The test was highly successful, and so Buhimschi began preparing a manuscript for publication. Although Buhimschi denies it, Romero claims that he was involved in this research in several important ways. Viewed in the light most favorable to Romero, the evidence supports a finding that he contributed to the research as follows. First, several years before Buhimschi's study was conceived of, Romero oversaw the collection of a bank of more than a thousand samples of amniotic fluid; in this capacity he formulated the collection protocols and personally performed many of the amniocenteses by which the samples were obtained.

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[3] More specifically, the research was an attempt to discover a proteomic profile that would indicate whether a woman experiencing preterm labor also had inflamed or infected amniotic fluid, which would be a sign that the preterm labor would likely lead to a premature delivery of the baby.

[4] Surface Enhanced Laser Desorption Ionization.

Romero dep., docket no. 95, ex. A, at pp. 233-34. It was from this bank that all or almost all of the samples used in Buhimschi's study were drawn. *Id.*

Second, after Buhimschi proposed the study, it was Romero who determined the "gold standards" against which the proteomic diagnostic technique would be tested; that is, he developed the criteria by which the samples of amniotic fluid would be initially categorized as infected/inflamed or not. The proteomic diagnosis was regarded as an accurate one if it "agreed" with the diagnosis indicated by the gold standard. Romero testified that based on his previous experience, he suggested the gold standard eventually used by Buhimschi – a white blood cell count of 100 or more. *Id.* at p. 70; *see also* docket no. 92, ex. 13, p.5. Docket no. 92, ex. 13, p. 5. With the help of another PRB doctor, Romero formulated this and other specific criteria by which he and the other doctor selected the 24 samples that were used in the blinded phase, and categorized them as "inflamed/infected" or "control."[5]

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[5] The clinical characteristics of the pathologic cases, as selected by Romero, were:

> 1) an amniocentesis because of preterm labor with intact membranes (no PROMs)
> 2) intra-amniotic inflammation (over 100 WBC)
> 3) patients with inflammation delivered shortly after the amniocentesis-preterm neonates
> 4) all patients had histologic chorioamnionitis
> 5) 50% of patients with inflammatnion had positive amniotic fluid cultures.
>
> Control cases were 1) patients who delivered at term were admitted with preterm labor and intact membranes before 33 weeks; [2)] had no elevated WBC in amniotic fluid;

Docket no. 93, ex. 24; docket no. 92, ex. 13, p. 5; Romero dep., docket no. 95, ex. A, at pp. 67-68, 236.

Third, the second and blinded phase of the study – which substantially increased its scientific value – was Romero's idea. Romero dep., docket no. 95, ex. A, at p. 236. Finally, Romero provided significant assistance to Buhimschi in preparing the manuscript. Romero testified that he and Buhimschi "went line by line in the manuscript many times." Romero dep., docket no. 95, ex. A, at p. 236. Copies of e-mails between Buhimschi and Romero's secretary were adduced in evidence, showing that Romero reviewed a preliminary manuscript with Buhimschi in late May of 2002, and offered "feedback and suggestions." Docket no. 93, ex. 26. Early in July of that year Romero sent Buhimschi "[a] short note to tell you that I have gone over the manuscript. I would like to propose some changes." *Id.* Although the nature of those changes is unclear, the e-mail records indicate that Romero set aside 10 hours of working time later that month of that year for further manuscript review with Buhimschi. *Id.* In August, Romero emailed a few more detailed suggestions to Buhimschi,[6] and promised to read the manuscript again and offer more feedback. *Id.* In

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3) had negative amniotic fluid culture and 4) delivered an AGA infant weeks after . . . the amniocentesis (> 37 weeks).

Docket no. 93, ex. 24.

[6] Specifically, Romero suggested that Buhimschi "change figure 1 by replacing 'intraamniotic infection' and 'intraamniotic inflammation' to 'yes' and 'no.' I think it may be a good idea to put the western blot in figure 4 as you have it in figure 5."

October, Romero emailed Buhimschi his opinion "that the manuscript has been improved over time and this will work to our benefit." *Id.*

After the research was completed, however, a dispute erupted between Romero and Buhimschi over whether Romero's involvement qualified him to be credited as an author in the anticipated publication of the results. The evidence adduced in this case includes voluminous records of the details of this dispute, and of the parties' disagreements as to these details, but these need not be recounted at length here. Instead, it is sufficient to note the following undisputed facts.

In November of 2002, Buhimschi, as corresponding author, initially submitted the manuscript to *The Lancet*, a British medical journal. This manuscript, *see* docket no. 90, ex. 3, listed Romero and other PRB doctors as authors. *The Lancet* responded favorably, but asked for several revisions. Docket no. 92, ex. 17. In the meantime, however, the relationship between Buhimschi and Romero had deteriorated, and she revised the manuscript without his assistance, removed Romero's name from authorship without his knowledge, and re-submitted the text to *The Lancet*. *See* docket no. 91, exs. 1 & 2. When Romero learned of this, he contacted *The Lancet*, which had been under the impression that he had agreed to the removal of his name, and which subsequently informed Buhimschi that it would not publish the work until the authorship dispute was resolved. Buhimschi withdrew the manuscript, and some months later submitted a revised version to the *British Journal of Obstetrics and Gynaecology* ("the *BJOG*"), again without Romero's knowledge and without listing him as an author. The *BJOG* eventually published the article in February

2005. Docket no. 91, ex. 9. When Romero learned of this he requested that it add his name to authorship, but the *BJOG* agreed only to print a statement of disputed authorship. Docket no. 94, ex. 37.

II. Procedural Posture

It is the February 2005 *BJOG* publication that is the basis of Romero's contract claim in the instant suit. He asserts that by publishing the results of the research without attributing him as an author, Buhimschi breached a contract between herself and Romero. Although there is no written contract between the parties, and Romero apparently does not contend that there was ever an explicit oral agreement to that effect, he asserts that his and Buhimschi's conduct is obvious evidence of an implied-in-fact contract between them.

Romero and Buhimschi have both moved for summary judgment on this contract claim; both motions are currently before the Court. Buhimschi bases her motion on a number of different grounds, including preemption of an implied contract by an express one, the void-for-vagueness doctrine, the Statute of Frauds, lack of legally-cognizable damages, and lack of consideration.[7] Because the Court

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[7] Buhimschi also briefly argues that this Court has no jurisdiction over Romero's contract claim. Although there is complete diversity of citizenship between the parties – Romero is a citizen of Michigan, and Buhimschi (after her move) and Yale are citizens of Connecticut – Buhimschi notes that Romero is not seeking money damages on his contract claim, and instead only asks that Buhimschi be required to correct the authorship credit. This, she argues, fails to satisfy the jurisdictional amount-in-controversy

concludes that there was no consideration to support any contract between the parties, it will not consider the other grounds asserted by Buhimschi, nor will it consider Romero's motion.

II. Analysis

A. Summary Judgment – The Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as to a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue of material fact regarding the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Martin v. Ohio Turnpike Comm'n*, 968 F.2d 606, 608 (6th Cir.1992).

In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences in a light most favorable to the nonmoving

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requirement of 28 U.S.C. § 1331. It appears, however, that the damages Romero is seeking on his other remaining claim (for defamation) could exceed $75,000. Because "[i]t is well established that claims can be aggregated to satisfy the jurisdictional amount requirement," *Klepp v First Am Bank*, 916 F. 2d 337, 341 (6th Cir. 1990), the Court has jurisdiction over the contract claim as well.

party. *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir.1987). The Court is not required or permitted, however, to judge the evidence or make findings of fact. *Id.* at 1435-36. The moving party has the burden of showing conclusively that no genuine issue of material fact exists. *Id.* at 1435.

A fact is "material" for purposes of summary judgment if proof of that fact would have the effect of establishing or refuting an essential element of the cause of action or a defense advanced by the parties. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Accordingly, when a reasonable jury could not find that the nonmoving party is entitled to a verdict, there is no genuine issue for trial and summary judgment is appropriate. *Id.*; *Feliciano v. City of Cleveland*, 988 F.2d 649, 654 (6th Cir.1993).

Once the moving party carries the initial burden of demonstrating that there are no genuine issues of material fact in dispute, the burden shifts to the nonmoving party to present specific facts to prove that there is a genuine issue for trial. *Anderson*, 477 U.S. at 256. To create a genuine issue of material fact, the nonmoving party must present more than just some evidence of a disputed issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). As the United States Supreme Court has stated, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmoving party's] evidence is merely colorable, or is

not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted); *see Celotex*, 477 U.S. at 322-23; *Matsushita*, 475 U.S. at 586-87.

Consequently, the nonmoving party must do more than raise some doubt as to the existence of a fact; the nonmoving party must produce evidence that would be sufficient to require submission of the issue to the jury. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252; *see Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir.1995).

B. Consideration

The parties do not dispute that the case is governed by Michigan law. In Michigan as in most every state, legal consideration is a required element of all contracts, both express and implied-in-fact. *Mallory v. City of Detroit*, 181 Mich. App. 121, 127 (1989). Under the "preexisting duty rule," however, "it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v. AAA*, 461 Mich. 732, 740-41 (2000). Thus, once a person has assumed a contractual duty to perform a certain act, his or her subsequent promise to do the same act – or actual performance of the act – cannot be consideration for a second contract. *Id.*

Here, Romero asserts that he had a contract with Buhimschi, whereby he was to collaborate with her in scientific research and she was to include him as an author in any publication of that research. It does

appear that in Michigan, the authorship of a research article can be the subject of a contract. *See generally Eadara v. Henry Ford Health Sys.*, Nos. 238137 & 238979, 2004 WL 243402 (Mich. App. Feb. 10, 2004). As noted above, there is evidence in this case to support a finding that Romero was indeed closely involved in designing the study, selecting the biological samples for it, and revising the manuscript.[8] Nevertheless, Buhimschi contends that all these functions fall squarely within Romero's own description of his job duties at the PRB. Thus, she claims that because Romero had a preexisting legal duty (to the PRB) to engage in these activities, his agreement to do so in with her could not form the basis of a contract between them.

Romero does not dispute that his entire collaboration with Buhimschi was within the scope of his PRB employment. The Court agrees that on this record, no reasonable jury could come to any other conclusion. But Romero objects that, while his job duties did include scientific research of the type he collaborated in with Buhimschi, he was under no preexisting duty to undertake any *particular* project or collaboration. Thus, he claims, his choice to work with Buhimschi on the proteomics project, instead of working on a different project or with someone else, should qualify as consideration for the contract.

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[8] He also was directly involved in formulating the protocols by which the samples were collected, and actually collected many of the samples himself But this could not have been consideration for any contract with Buhimschi, because it occurred years before their collaboration, and there is no evidence in the record that Romero and Buhimschi even knew each other at that time.

This argument has significant appeal – there certainly is nothing in the record to indicate that the PRB expected Romero to involve himself in any particular project. Nonetheless, the Court ultimately finds it lacking in merit. Although Romero obviously enjoyed a great deal of discretion in determining which projects to work on, it must certainly have been the PRB's understanding that he would exercise this discretion solely in the PRB's interest and not for personal gain. Thus, having determined that collaboration with Buhimschi and on the proteomics research was a worthwhile project – as he clearly had, given his personal recruitment of Buhimschi and his obvious interest in the proteomics project – Romero had an obligation to the PRB to pursue it.

All this is to say that a government employee who has discretion in his work is not, as a matter of contract law, free to make side bargains with third parties that will control the exercise of that discretion. For instance, if a government scientist demanded cash payments as a condition of agreeing to a scientifically worthy collaboration, the preexisting duty rule would bar his suing to collect on such a bargain.[9] This conclusion is fully supported by the Restatement (Second) of Contracts, § 73 cmt. b., which states that "[a] bargain by a public official to obtain private advantage for performing his duty is . . . unenforceable as against public policy. And . . . performance of the duty is not consideration for a promise."[10] This

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[9] Such a recovery would also likely be barred by statute, but that is not the point here.

[10] Buhimschi also suggests that her position is reinforced by 5 C.F.R. 2635.807(a), which provides that a government employee

proposition does not mean that government scientists are unable to demand authorship credit in return for their scientific collaboration with outside researchers. It simply means that the demand should not be couched in terms of contractual obligations.[11]

Romero further states that, if he had known that Buhimschi would refuse to acknowledge him as an author, he would not have agreed to collaborate with her. Thus, he suggests that it would be nonsensical and inequitable to construe his obligations to the PRB as requiring him to collaborate with Buhimschi even if she refused in advance to include him as an author. While the Court largely agrees with this argument, it does not find it to be relevant to the case. More specifically, the Court is inclined to agree that if before

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"shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties," and defines "compensation" as "any form of consideration, remuneration or income . . . given for or in connection with the employee's teaching, speaking or writing activities," *id.* § 2635.807(a)(2)(ii). But the "consideration" that Romero claims he received here – a promise of authorship of a scholarly article – cannot be within the scope of this regulation. Government scientists routinely receive authorship credit for their collaborations, without anyone suggesting they are breaking the law. Yet if, as Buhimschi suggests, authorship credit were regarded as "consideration . . . given for or in connection with" the *writing* activity, this would indeed be contrary to the regulations.

[11] Although the Court's findings would be the same in any event, this order's conclusions also offer some protection to the scientific community against inappropriate intervention by the courts. It would be an undesirable state of affairs if the courts, rather than scientists (who are much better positioned to do it), were required to determine whether any particular scientist's work on a project was worthy of authorship credit.

their collaboration began Buhimschi had preemptively declared her unwillingness to include Romero as an author in the published results, his duties to the PRB would not have required him to do the work with her--because it would not in the PRB's interest for its scientists (and the PRB itself) to be denied the credit they deserve for their work. But even by Romero's account, that is not what happened here. Although Romero and Buhimschi apparently did not explicitly discuss authorship until well into the project, on Romero's evidence it appears that they both assumed from the outset that he would be an author if the work resulted in publication. Under circumstances such as these, the Court concludes that Romero's duties to the PRB required him to conduct the collaboration on determining it to be worthwhile, with the presumption that Buhimschi would comply with scientific ethics in regard to authorship attribution.

C. Conclusion

For these reasons, Romero has failed to present evidence that would permit a reasonable jury to find that he undertook any contractual duty to Buhimschi that he was not already bound to by his preexisting contractual responsibilities to the PRB. As a result, there are no facts in the record sufficient to establish a contract between himself and Buhimschi, and summary judgment will therefore be granted in favor of Buhimschi on Romero's contract claim.

LIBEL CLAIM

Before filing this lawsuit, Romero recounted his version of the facts of the case in various fora, as he attempted to prevent what he perceived as further

misconduct by Buhimschi. Buhimschi responded with her account of how the collaboration and dispute between herself and Romero progressed, which as one might suspect is quite different from Romero's. Count V of Romero's amended complaint asserts that Buhimschi's version of the events, as published by her and republished by others, is libelous as against Romero.[12] As all claims arising prior to January 28th, 2005, have previously been dismissed pursuant to the applicable statute of limitations, docket no. 61, the Court will here discuss only publications that allegedly occurred after that date.

A. Facts

1. Circumstances of the publications

Romero presents three separate publications that he claims were libelous. Two of them are related, in different ways, to a complaint of scientific misconduct that Romero filed against Buhimschi at Wayne State University, after she submitted the *Lancet* manuscript for publication without listing Romero as an author. Buhimschi participated in the ensuing scientific-misconduct investigation in only a limited fashion. She gave several reasons for this, the only one of which is

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[12] Romero has moved for leave to amend his complaint to add additional counts of defamation against Buhimschi and other new defendants associated with Yale. Docket no 150. The reasoning below for the Court's grant of summary judgment on Romero's existing claim, would also apply to the proposed new claims. Because the Court thus finds that the underlying facts and circumstances relied on by Romero would not be a proper subject of relief, his motion to amend will be denied as futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

relevant here is that while the investigation was going on, she and her husband were in the process of leaving Wayne State and taking up new posts at Yale University's School of Medicine. After the Wayne State investigative committee concluded that she had indeed engaged in misconduct, however, Buhimschi (writing now from Yale) submitted a lengthy appeal letter setting out her side of the story in full. Romero claims that many of the statements contained in this appeal letter were libelous. Because this letter was submitted on January 20th, 2005 – more than one year before Romero filed the instant suit -- his claim based on the initial publication to Wayne State is barred by the relevant statute of limitations. A few weeks after Buhimschi initially sent the appeal letter, however, the *BJOG* published her research, again without attributing Romero. When Romero learned of this, he notified Wayne State officials, who promptly communicated with the editors and stated that Buhimschi had improperly denied Romero a share of the authorship. The editors told Buhimschi of Romero's claim, and she responded on March 14th, 2005, by forwarding to the *BJOG* a copy of her appeal letter. This republication is within the statute of limitations, and is the first of the three publications that Romero complains of here.

The defamatory statements in the appeal document can be roughly grouped into three categories. First, Buhimschi claims that Romero improperly took credit for her ideas and research, and then published them and applied for a patent under his own name, in competition with her. *E.g.*, Buhimschi appeal letter, docket no. 119, ex. 2, at §§ 1.3 (Romero proposed Buhimschi's research ideas to another researcher as his own); 1.5 (based on progress reports from

Buhimschi, Romero secretly undertook research parallel to hers "so that he could take credit for my work"); 1.7 (Romero passed off Buhimschi's work as his own to the NICHD); 1.8 (Romero delayed submission of Buhimschi's manuscript, and halted further work by Buhimschi because she would not make him the principal investigator, for fear that it might "contradict[] his lifetime theory"); 1.20, 2.8 (Romero plagiarized Buhimschi's work, then "rushed" it to publication without peer review in a journal on which he was on the editorial board, in order to publish ahead of Buhimschi); 4.16 ("Dr. Romero filed a competitive patent application which includes figures, text and data analysis from my work . . . .).

Second, Buhimschi stated that Romero frequently pressured her to confer authorship recognition in the article on persons who had made little or no contribution to the research. *Id.* at § 1, *passim*; *see also id.* §§ 1.9 (Romero engaged in "inappropriate physical contact" with her in an attempt to persuade her to include as an author a researcher who had made no contribution, and to falsely admit that she had learned proteomics from that researcher); 5.6.1, 5.6.5 (Romero pressured her to include other members of the PRB as authors even though their research contributions were insufficient).

Finally, Buhimschi claimed that in response to her unwillingness to acquiesce to his inappropriate demands, Romero engaged in a general campaign of harassment against her, often by playing up the PRB's contractual leverage with Wayne State to get Wayne State employees to do Romero's bidding. *E.g.*, *id.* §§ 1.9 (Romero told Buhimschi and her husband "that we had to give him all our research projects in exchange for

his institutional 'protection,'" and that if they refused "he would take this as a personal offense rising to the level of 'his career against my career'"); 1.13, 1.15 (at Romero's request, Wayne State officials blocked Buhimschi's husband's access to biological samples and engaged in other harassment to impede her research). According to Buhimschi, some of this harassment was also designed to secure for Romero valuable patent information that belonged to her. *Id.* § 3.1 ("Dr. Romero filed a bogus complaint of misconduct," and at his bidding WSU officials locked Buhimschi out of her office and cut her email access, in order to secure and photocopy information related to their competing patent applications).

Buhimschi's appeal was eventually denied, and Wayne State's finding that she had committed scientific misconduct thus became final.[13] The investigative committee had recommended that Buhimschi's future publication submissions be monitored to ensure that she was crediting authorship properly. Since Buhimschi was now at Yale, Wayne State forwarded the findings of its investigative committee to Yale, and requested Yale's help in implementing the committee's recommendation. In response, Yale convened an *ad hoc* committee to consider whether to accept the Wayne State committee's findings, and whether Yale should take

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[13] The accuracy of this finding is not at issue in this case Therefore, the Court notes, but expresses no opinion on, Buhimschi's allegations that there were numerous deficiencies in the Wayne State proceedings that rendered them fundamentally unfair. In particular, she claimed that Romero's personal contacts and institutional influence at Wayne State rendered the proceedings rife with conflicts of interest.

any action with respect to that committee's recommendations.

The second publication of which Romero complains here is a letter sent on May 4th, 2005, from Lawrence Cohen, the special adviser to the Dean of Yale Medical School, to each member of the *ad hoc* committee. Docket no. 119, ex. 4A. This letter summarized the dispute and explained what the committee was to do. Thus, it included a summary of Buhimschi's contentions with respect to Romero's pressuring her to bestow "gift authorships" and attempts to steal Buhimschi's research. *Id.*

Finally, before she ever submitted the disputed manuscript to the *BJOG*, Buhimschi had become concerned that its publication might be delayed indefinitely by the dispute with Romero. As a result, she contacted a former mentor of hers, Dr. Carl Weiner, and requested that he explain her perspective on the manuscript's provenance to the *BJOG* editorial staff. Weiner agreed, and in a series of emails to one of the *BJOG*'s editors he stated, among other things, that Romero had rushed Buhimschi's research to publication under his own name even though he had not been involved in it, and that he was engaged in a "ploy over authorship" in an attempt "to justify the claims to the patent." Docket no. 119, ex. 3. Weiner concluded that "[i]t seems clear to me that Roberto is trying to leverage the position of the NIH to claim work that is definitively not his. My guess is that he mislead [sic] his superiors about his [sic] origins and is now in a position he cannot admit." *Id.* Although Weiner sent the last of these emails in October 2003, well before the applicable limitations period in this case, Buhimschi republished them via facsimile

transmission to Susan Carney, a deputy general counsel at Yale, on May 4th, 2005 (the same date that Lockwood mailed his letters to the members of the *ad hoc* committee). This fax was within the limitations period, and is the third publication of which Romero complains.

B. Procedural Posture

Romero claims that each of these publications amounts to defamation *per se*, entitling him to judgment against Buhimschi and also against Yale on a theory of *respondeat superior*. Buhimschi and Yale have moved for summary judgment, offering a number of defenses to liability. These include Michigan's common-law privilege in favor of communications made during quasi-judicial proceedings, its statutory privilege in favor of accurate reports of public proceedings, the First Amendment's protections for statements about public figures and public officials, and Michigan's privilege in favor of communications between persons having an interest in their subject matter. Yale also separately argues that on these facts, it cannot be liable in *respondeat superior* for any tortious conduct Buhimschi may have engaged in. The Court will not consider these legal theories, however, because it finds all the communications in question to be protected by yet another privilege advanced by Buhimschi and Yale: that of consent, as implied by Romero's conduct.

C. Analysis

"A communication regarding a person is absolutely privileged if it is consented to." *Merritt v. Detroit Memorial Hospital*, 81 Mich.App. 279, 265 N.W.2d 124

(1978). In Michigan, a plaintiff need not have approved or even been aware of the exact contents of a defamatory statement in order to consent to its publication. Indeed, in previous cases the Michigan courts have found that a plaintiff's invocation of an employer's administrative or disciplinary proceedings was effective as consent to the publication of the other side of the story. In *Schechet v. Kesten*, 3 Mich. App. 126 (1966), an osteopath working at a hospital was placed under supervision by the chairman of the department of surgery, who cited unnamed concerns about the doctor's judgment *Id.* at 129. The doctor responded by invoking his contractual rights to "the specific list of charges" on which the decision was based, and to raise the issue before the hospital's executive committee. *Id.* at 130. He requested the list of charges from the executive committee as well. *Id.* at 131. In response to this, the chairman sent the committee a letter listing a long series of alleged deficiencies in the plaintiff's performance. In conclusion, the letter stated that "Dr. Schechet is so obsessed with insecurity, hate, fear and frustration that has so warped his judgment, that his activities have become dangerous to the Staff, Hospital and Osteopathic Profession." *Id.* at 131-32. The court held that by demanding the list of charges, the doctor had consented to its publication, which was therefore privileged against liability for defamation. *Id.* at 133.

Similarly, in *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561 (1980), the plaintiff alleged that one of the defendants "slandered plaintiff in a board of directors meeting," *id.* at 574, by accusing her "of having lied about her employment and business background and experience and accused plaintiff of incompetence in her profession," *id.* at 574 n.3. The

court noted, however, that "plaintiff acknowledged in her deposition that she requested the board of directors to discuss defendant Brown's dissatisfaction with her performance." *Id.* at 574. Thus, the court concluded, "[p]laintiff requested the very conversation which she alleges slandered her. . . . Under the circumstances, we find plaintiff consented to the slander of which she complains." *Id.* at 575.

An explicit solicitation of the defamatory statements is not required before a court will find plaintiff to have consented to them. Instead, Michigan courts have found plaintiffs to have consented to defamatory statements simply by making accusations of impropriety or wrongdoing to which the defendant responded with the complained-of publication. For instance, in *Medical Planning Consulting, Inc. v. St. Mary's Medical Ctr.*, No. 214018, 2000 WL 33418859 (Mich. App. June 13, 2000), the plaintiff's attorney sent a letter to the defendant, threatening to file suit over the defendant hospital's termination of the parties' previous business dealings. The letter further stated that the plaintiff had

> agreed with my recommendation that I should offer the hospital one last opportunity . . . to satisfactorily resolve this situation [before litigating]. It is my understanding that Medical Planning Consulting, Inc., has provided valuable services to the hospital over the last ten years without complaint by the hospital, and to the hospital's great financial benefit, and it is surprising to me that the hospital would terminate such a longstanding relationship without so much as any written notice to a company that they had done business with

> successfully for so many years, let along [sic] the one year written notice required by the "Memorandum Agreement."

Id. at *5 n.4 (alteration in original). In response, one of the defendants wrote to the attorney, stating that the plaintiff's sole employee and shareholder had "retrospectively altered patient billing records in an attempt to gain financial benefit" for herself. *Id.* at *5. The plaintiff sued, claiming that these statements were defamatory. But the court held that through her attorney's initial letter, the plaintiff had "requested a response" as to why the business relationship had been terminated, and thus "invited the alleged defamatory statements," rendering them absolutely privileged. *Id.*

In this case, the record permits only one conclusion: like the plaintiffs in *Schechet*, *Hollowell*, and *Medical Planning*, Romero invited the statements by Buhimschi that he now alleges defamed him. Similarly to *Schechet* and *Hollowell,* it was Romero who invoked the Wayne State disciplinary proceedings to which Buhimschi's original appeal letter was a response. It was Romero who prompted Wayne State to notify the *BJOG* of the investigatory committee's findings, to which Buhimschi responded – analogously to *Medical Planning* – by forwarding her appeal document to the *BJOG*. When the committee's findings were forwarded to Yale Medical School – as Romero surely had intended, given his stated desire to protect himself from Buhimschi's improper publication of any more of the data he says they generated together – Yale responded by forming a committee of its own, and having the special advisor to its Dean summarize Buhimschi's side of the story to the committee. Buhimschi herself responded, on the same day, by

forwarding Weiner's articulation of her side of the story to Yale's deputy general counsel.

Romero argues that Wayne State submitted its report to Yale and the BJOG on its own initiative, and that there was no privity between it and Romero. Thus, he says, he cannot be held to have invited Buhimschi's and Lockwood's responses to the BJOG and Yale. The Court finds this to be an impossibly strained reading of the facts. Romero's scientific misconduct complaint was much more than a request for purely declaratory relief that would remain internal to Wayne State. Rather, it was an attempt to protect Romero's scientific reputation and his right to recognition for research, the results of which were intended to follow Buhimschi wherever she went. Indeed, Romero himself identified to Wayne State a number of persons outside the university who he wished to have notified of the results of the investigation. Romero dep., docket no.95, ex A, at p. 166. The report was actually sent to scientists and other persons in the medical field across the entire country, including five individuals at Yale.[14] Docket no. 95, ex. A-30. Given this evidence, no reasonable jury could find that Romero did not invite not only Buhimschi's attempts to clear her name before the Wayne State committee, but also her presentation of her side of the story to Yale and to the *BJOG*. There is

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[14] This transmission occurred in October 2004, before the *BJOG* article was published or known to Romero. As a result, no representative of the *BJOG* was on the initial list of persons to be notified of the report. Nonetheless, it is clear that the notification that eventually occurred was motivated by the same purposes, protecting Romero's reputation and research, as the original notices.

no evidence to contradict the record support for any of these conclusions, and accordingly the Court concludes that no reasonable jury could find otherwise. Under these circumstances, each of these responses was invited – and thus consented to – by Romero's various complaints about Buhimschi's conduct. As a result, each of them is privileged, and none of them can be the basis for libel liability for either Buhimschi or Yale.

CONCLUSION AND ORDER

Romero claims that he had a contract with Buhimschi, whereby he would collaborate with her on proteomics research and she would include him as an author in any resultant publication. Because, however, the evidence dictates the conclusion that Romero's entire collaboration with Buhimschi was simply a part of his preexisting employment duties, there could never have been a legally enforceable contract between the two doctors.

Romero also claims that various publications by Buhimschi and Yale libelled him. The record evidence, however, compels the conclusion that all these publications respond to complaints and reports of Buhimschi's misconduct made by Romero himself. As a result, under Michigan law, Romero consented to these publications through his conduct, and they are therefore privileged and cannot form the basis of a libel claim.

As the record shows, the scientific and academic communities have invested considerable resources in establishing their own institutions and procedures for dealing with claims of this type. Although these doubtless have their own flaws, in many cases they

will likely prove superior to the judicial system in resolving this sort of dispute. As the facts of this case have failed to properly present the scientific controversy at its core for judicial resolution, it is the Court's responsibility to enter summary judgment for the defendants.

WHEREFORE, it is hereby **ORDERED** that:

> the defendants Buhimschi's and Yale's motions for summary judgment (docket nos. 95 & 97) are **GRANTED**, and Romero's motion for partial summary judgment (docket no. 90) is **DENIED**;
>
> Romero's motion for leave to amend his complaint, docket no. 150, is **DENIED** as futile, for the reasons articulated in this opinion; and
>
> Romero's motion *in limine*, docket no. 145 is **DENIED AS MOOT**.

Judgment as to all remaining claims will be entered in favor of defendants, and the case will be closed.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: January 14, 2009

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on January 14, 2009, by electronic and/or ordinary mail.

s/Alissa Greer
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 06-cv-10859

[Filed January 14, 2009]

ROBERTO ROMERO,	)
	)
Plaintiff,	)
	)
v.	)
	)
IRINA BUHIMSCHI and YALE UNIVERSITY,	)
	)
	)
Defendants.	)
	)

HONORABLE STEPHEN J. MURPHY, III

JUDGMENT

The above entitled matter having come before the Court, the Honorable Stephen J. Murphy, III presiding, the issues having been fully presented, the Court being fully advised in the premises, and a ruling having been duly rendered granting the defendants' motion for summary judgment, **IT IS ORDERED AND ADJUDGED** that the plaintiff takes **NOTHING** from the defendants, and that the action against the defendants be **DISMISSED WITH PREJUDICE**.

Dated at Detroit, Michigan, this 14th day of January, 2009.

DAVID WEAVER
Clerk of the Court

BY: s/A. Greer
Deputy Clerk

APPROVED:

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:06-cv-10859

[Filed August 10, 2009]

ROBERTO ROMERO,

Plaintiff,

v.

IRINA BUHIMSCHI, YALE UNIVERSITY, CARL WEINER, ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS, and JOHN DOES A through G,

Defendants.

HONORABLE STEPHEN J. MURPHY, III

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (docket no. 154) OF THE COURT'S ENTRY OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

This case centered around a disagreement between two research physicians, plaintiff Roberto Romero and defendant Irina Buhimschi, as to whether Romero was entitled to be credited as an author in a research article that Buhimschi submitted for publication without giving him such credit. Buhimschi was a professor of Obstetrics and Gynecology at Wayne State University's medical school; Romero is chief of the Perinatology Research Branch ("PRB") of the National Institute of Child Health and Human Development. The PRB is housed at Wayne State. Buhimschi has since left Wayne State to take a position at Yale University, and Romero named Yale as an additional defendant in this lawsuit.[1]

On January 24th, 2009, the Court entered summary judgment as to all the surviving claims in Romero's complaint. One of these claims was for breach of an implied contract, by which Romero allegedly agreed to collaborate with Buhimschi, and she in return promised to include him as an author if he merited it. The Court concluded that Romero had a preexisting duty to his employer to identify and pursue the most worthy scientific collaborations available, and that any agreement by Romero to collaborate with Buhimschi therefore could not constitute consideration of the type necessary to support a contract. The other remaining count was for libel. Buhimschi had submitted documents to Yale and to the medical journal in which she sought publication, alleging that Romero had engaged in various types of misconduct.

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[1] As the caption indicates, Romero named other defendants as well, but the claims against those defendants have been disposed of and are not subjects of this motion

Romero asserted that this amounted to libel, but the Court granted summary judgment on this count as well, holding that Romero had first accused Buhimschi of wrongdoing and thus had implicitly consented to her response.

In the instant motion, Romero requests that the Court reconsider its grant of summary judgment on his defamation claim. For the reasons that follow, the Court will deny the motion.

FACTS

Most of the relevant facts are set forth in the Court's Opinion and Order of January 24th, which is incorporated herein by reference. As the Court noted in that Opinion and Order, after the statute of limitations is taken into account, three publications remain that could potentially result in libel liability for Buhimschi. To explain its denial of reconsideration, the Court will catalog their contents in more detail here.

I. The Appeal Document

The first publication is Buhimschi's letter of appeal to the Dean of Wayne State University's Graduate School. *See* docket no. 103-8. The circumstances of the original submission of this document, and of Buhimschi's re-publication of it to the *British Journal of Obstetrics and Gynaecology*, are detailed in the Court's Opinion and Order of January 14th. Liability for Buhimschi's original submission of the letter to Wayne State is barred by the statute of limitations, but her submission of the same document to the

BJOG, in response to Wayne State's communication to it of the results of Wayne State's investigation, is not.

The letter is indeed replete with accusations of serious wrongdoing by Romero. These come under four main headings: (1) that Romero "stole" Buhimschi's work and used it as the basis for his own publication and patent application, (2) that Romero pressured her to attribute authorship credit to those who did not deserve it, (3) that Romero improperly used his institutional position to pressure Buhimschi to commit research misconduct, and (4) that Romero was personally abusive and unpleasant.

First are the accusations that Romero improperly tried to take credit for Buhimschi's research. The Appeal Document states that Romero "duplicated and published part of the [proteomics] data" that Buhimschi had generated "without *peer-review* in a journal where he serves in the Editorial board, without including or acknowledging me." Appeal doc., p. 9.[2] Buhimschi states that less than 48 hours after she first told Romero of her plan to look for proteomic biomarkers in amniotic fluid -- which was the subject of the disputed article - Romero secretly submitted a proposal including aspects of this work to another doctor. *Id.* ¶ 1.3. While Buhimschi's research was being conducted and while she was drafting her manuscript, she provided Romero with periodic updates on the work, and maintains that he was secretly "conducting parallel experiments" based on

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[2] Most of Buhimschi's Appeal Document is divided into numbered paragraphs The portions that are not will be cited to by page number.

this information "for the purpose of competing against me so that he could take credit for my work." *Id.* ¶ 1.5. These parallel studies, according to Buhimschi, were "aimed to quantify some of the biomarkers I discovered." *Id.* ¶ 1.9. Romero told the other doctors he was working with to keep this research secret from Buhimschi and her husband. *Id.* After Buhimschi assisted Romero in preparing a proteomics presentation for the NIH leadership, she claims that he presented the work as if it had been done by him instead of her, and that he obtained funding by doing so. *Id.* ¶ 1.7. Eventually, Buhimschi claims that Romero "rushed to publish" his competitive research "ahead of our joint manuscript." *Id.* ¶ 1.20. Romero's publication, according to Buhimschi, plagiarized a diagnostic scoring method from her manuscript and duplicated some of her data and "reported [it] as original research." *Id.; see also id.* ¶ 5.6.2. Ultimately, Buhimschi claims, "Dr. Roberto Romero filed a competitive patent application which includes figures, text and data analysis from my work along with the figures and results incorporated in his duplicative manuscript already published." *Id.* ¶ 4.16; *see also id.* p. 26.

The second category of assertions in the appeal document are Buhimschi's claims that Romero tried to convince her to give authorship credit to researchers who were clearly not entitled to it. The appeal letter asserts that Romero has "a tendency . . . to attribute authorship based on his personal relationships, provision of test materials or funds and not necessarily upon actual contributions to the subject matter of the work.," and that "[this flagrantly contravenes authorship policies," *id.* p. 9; *see also id.* ¶ 5.5, as well as "practices commonly accepted in the scientific

community for proposing[,] conducting or reporting research," *id.* p. 24. Buhimschi claims that when the research was nearly complete, she gave in to pressure from Romero to draft a document stating that several doctors had made contributions to the research, even though in fact some of those doctors did not merit authorship. *Id.* ¶¶ 5.6.1, 5.6.5. After the manuscript was finished, Buhimschi states that Romero "insisted]" that she add as an author another doctor who "had not been involved in any way on the project". *Id.* ¶ 1.6. Romero "pressured [Buhimschi] numerous times" to that effect. *Id.*; *see also id.* ¶1.11. Buhimschi also stated that Romero "request[ed]" that she "modify experimental data" in some unspecified way. *Id.* ¶ 1.6. Other portions of the appeal letter seem to indicate that the modification Romero allegedly requested was that Buhimschi state that the research took place later than she really did, so as to make it appear as if she had learned the proteomics techniques from the doctor who Romero wanted to be an additional author (or from one of that doctor's associates). *Id.* ¶ 1.9; *see also id.* pp. 9-10.

Third, as the dispute deepened, Buhimschi's appeal document accuses Romero of using his "administrative power," *id.* p. 10, to try to coerce her into agreeing to his demands by needlessly delaying submission of her manuscript and halting the progress of her other work, *id.* ¶ 1.8. Buhimschi's husband was also a doctor involved in medical research at Wayne State; she claims that at Romero's request, WS took "actions aimed to stop my husband from having access to biological samples, and implicitly progress on the prospective study I initiated and thus on my grants." *Id.* ¶¶ 1.13, 3.1. Romero also got WS to harass Buhimschi in order to "directly impinge" her

presentation of the proteomics work to the Society for Maternal-Fetal Medicine. *Id.* ¶ 1.15. Buhimschi was told, she alleges, that if she would accede to Romero's improper requests her "issues" with Wayne State would "disappear." *Id.* ¶ 4.2. After the inquiry into Romero's allegations of scientific misconduct began, Buhimschi alleges that Wayne State officials "began 'securing' the experimental data and my laboratory books in the interest of Dr. Romero," in an attempt to procure patent data for him. *Id.* ¶ 3.1. Buhimschi claims that correspondence between Romero and Wayne State officials proves this allegation. *Id.*

Finally, and more generally, Buhimschi's appeal document accuses Romero of having an "abusive professional style." *Id.* ¶ 2.5. Buhimschi states that during the course of the dispute it became "obvious" to her that "constructive dialogue was not Dr. Romero's intention." *Id.* ¶ 4.14. She states that she had "many bizarre interactions with so many different individuals at WS, all based on Dr. Romero's petty politics of power." *Id.* p. 28. Buhimschi asserts that several of the series of events just described came to a head when she discovered Romero's secret parallel experiments and confronted him about them. *Id.* ¶ 1.9. According to Buhimschi, Romero belatedly offered her a chance to be an author on his "secret" project, which she refused because his manuscript was basically complete. *Id.* As she left Romero's office after this incident, Buhimschi says that he "followed me down the corridor" and addressed her "in an abusive manner including inappropriate physical contact." *Id.* Buhimschi states that at this point Romero reiterated his demands that a non-contributing doctor be made an author on her own manuscript, that she falsely state that she had learned proteomics techniques from this

non-contributing doctor, that she falsify the manuscript in regard to the dates on which the proteomics data had been generated, and that she disclaim any intellectual property value in the manuscript. *Id.* Buhimschi also claims that at a later meeting, Romero demanded that "my and husband and I . . . give him all our research projects in exchange for his institutional 'protection.'" *Id.* She also claims that the charges of misconduct against her were an attempt by Wayne State and Romero "to gain improperly in the patent process." *Id.* p. 20.

II. Letter to Yale *Ad Hoc* Committee

The second allegedly defamatory publication took place at Yale University, in the form of a letter from Dr. Lawrence Cohen to members of an *ad hoc* committee convened by Yale to consider whether to implement the sanctions that the Wayne State committee had recommended against Buhimschi.[3] Cohen briefly summarized Dr. Romero's complaints against Buhimschi related to Romero's removal from authorship. Cohen then noted that Buhimschi's version of the events in question includes allegations of scientific misconduct by Romero "that may not have been addressed by the WSU investigation Committee." Cohen then summarizes those allegations:

> [Buhimschi] explains that . . . Dr. Romero required her to add himself and three others and their data into the manuscript for his own professional advantage; he pressured her to add

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[3] Again, more specifics as to the circumstances of the sending of this letter can be found in the Opinion and Order of January 14th.

another high ranking individual as author, one whom she alleges made no contribution at all to the manuscript; and he delayed her first-author publication in order to gain personal and professional advantage by publishing similar material first. She argues that her professional vulnerability at WSU as a junior faculty member, and that of her husband, meant that she could not advise the Romero co-authors that their contributions (and hence their authorship) were being deleted at the suggestion of the journal, for fear of harmful retaliation. Dr. Buhimschi and Dr. Romero are also engaged in a patent dispute concerning the subject of the manuscript . . . ."

III. Emails from Dr. Weiner to Dr. Thornton

The final publication not barred by the statute of limitations consists of a series of emails sent from Dr. Carl Weiner, a former mentor of Dr. Buhimschi's, to one of the *BJOG*'s editors. Again, any liability based on the original emails is barred by the statute of limitations; Romero's claim is predicated on these documents' republication by Buhimschi, in the form of a fax to an attorney for Yale University, sent after Yale received Wayne State's request to monitor Buhimschi's publication submissions.

The email from Wiener contains many charges that are similar to those made by Buhimschi in her appeal document. Weiner states that "[w]hile [the proteomics research was] under review by the Lancet, Roberto published the same work in his journal (Perinatal and Neonatal Medicine, the so-called Black J[ournal]) after a 1 day review and acceptance process." Docket no.

119-5, p. 4. Weiner emphasizes that, with respect to the *Lancet* article, "Roberto never saw the information until shown the finished results," *id.*, and again states that Romero's parallel publication "contained only the ELISA material that was with the original LANCET submission as confirmation of the proteomic analysis. It was then presented in the BLACK J as a 'new discovery,'" *id.* at 1.[4] Weiner also states that

> Roberto was claiming ownership of any patent rights because he provided some samples, though there is no such written agreement. The ploy over authorship, I believe, was to obtain the raw data so that he could justify the claims to the patent. Several law firms have to date concluded his claims are unfounded.

Id at 4. According to Weiner, "[Buhimschi] fears he is actively seeking to duplicate the data and publish the results as his own. . . . [This] would sadly allow a senior member of our field to rob a young investigator of recognition of [sic] her work." *Id.* Weiner's conclusion is that "Roberto is trying to leverage the position of the NIH to claim work that is definitively not his. My guess is that he mislead [sic] his superiors about his origins [sic] and is now in a position he cannot admit." *Id.*

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[4] This statement apparently originated as a clarifying comment in a later emails, but was part of a single document that Buhimschi faxed to Yale's attorney.

ANALYSIS

These publications are arguably defamatory. The question here, however, is whether they were privileged in some way. In granting summary judgment, the Court held that by acting as complainant in the Wayne State proceedings, Romero consented by his conduct to a response by Buhimschi. In moving for reconsideration, Romero takes issue with that conclusion, arguing that there are several limitations on the doctrine of implied consent that bar a finding of consent here. The Court has already rejected Romero's argument that he did not consent to Buhimschi's publications because he did not know they would turn out to be defamatory. Thus, only Romero's other asserted limitations on the consent doctrine remain. Each will be discussed in turn.

A. Prior Publications

Romero argues that a plaintiff's consent to a defamatory publication does not bar liability if the same publication was previously made without the plaintiff's consent. In favor of this proposition, he cites only a single clause of a single sentence in a 45-year-old case from Missouri. *Hellesen v. Knaus Truck Lines*, Inc., 370 SW 2d 341, 346 (Mo. 1963). The Court finds no evidence that this doctrine is part of the law of Michigan. Nor does the Court discern any sound rationale for this rule. An unprovoked defamatory utterance is, and should be, grounds for liability, if no privilege or defense applies. But once the plaintiff has joined the fray by taking steps that invite a response from the defendant, the defendant's prior defamation should not act as a muzzle, making all further comments equally tortious. If a plaintiff wishes to

avoid immunizing future defamations by consenting to them, he should limit himself to denying the allegations and avoid taking steps that clearly invite a response.

Even if this doctrine were a part of the law of Michigan, however, it presumably would mean only that a prior publication would negate consent to republication to the same person or persons that received that previous publication. It would be preposterous if a defendant's defamatory publication to person A would mean that the plaintiff could bring some sort of charge against the plaintiff in forum B, and then sue the defendant for telling his side of the story when invited to do so by the authorities in forum B. But that is precisely what Romero argues here. Buhimschi did in fact make defamatory publications against Romero before Romero assumed to role of complainant -- the email from Weiner to the *BJOG* was dated October 10th, 2003, and he presumably was relying on information relayed to him by Buhimschi, whereas the Wayne State investigative committee did not reach its conclusions until May 20th, 2004. There would thus be some justification for a legal rule that would permit Romero to contact Weiner (and whomever else Buhimschi may have published her accusations to) and try to clear his name, without exposing himself to further defamations by Buhimschi. But it would be remarkable if these statements by Buhimschi to Weiner (and probably others), to the effect that Romero stole her research, could prevent her on pain of libel liability from later telling the same story to Yale and the *BJOG* after the Wayne State process instigated by Romero communicated his

accusations to those institutions.[5] This is not the law, and the Court will not disturb its earlier holding on this basis.

B. Knowledge of Plaintiff's Disagreement

Romero's next contention is that a plaintiff does not consent to a publication if the defendant knows or has reason to know, at the time of publication, that the plaintiff disputes its accuracy. In support of this contention, he cites *Compuware Corp. v. Moody's Investors Servs., Inc.*, 499 F. 3d 520 (6th Cir. 2007) (applying Michigan law). In that case, Compuware hired Moody's to assign an initial rating to Compuware's creditworthiness, and then to conduct continued monitoring of Compuware's financial situation. *Id.* at 522-23. About two and a half years after issuing its initial rating, Moody's prepared a "proposed ratings report" that would have downgraded Compuware's ratings to "junk" status. *Id.* at 523. The report also explained the reasons for the downgrade. The proposed report was sent to Compuware's Chief Financial Officer for prepublication review, and the next day the CFO responded to Moody's, taking issue with some of the report's account of Compuware's finances, and generally objecting "that the ratings downgrade was unjustified given Compuware's current financial situation." *Id.* at 524. Moody's nevertheless issued the report, with the downgrade intact, a few

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[5] Romero seems to take the position that Buhimschi's submission of her appeal letter to the *BJOG* was in fact merely a repetition of the libels that Weiner had emailed to the *BJOG* before the Wayne State investigatory process began. In light of the Court's holding that prior publication is not a bar to implied consent, there is no need to make a determination on this question.

days later. *Id.* In response, Compuware filed suit, alleging among other things that the report was defamatory. The trial court granted summary judgment for Moody's, however, holding that Compuware had not created a question of fact as to whether Moody's had published the report with actual malice, as would have been required for liability since Compuware was a public figure. *Id.* at 525. The trial court also concluded that, by conducting prepublication review of the report, Compuware had consented to the publication of all its contents except those portions that Compuware had specifically objected to. *Compuware Corp. v. Moody's Investors Servs., Inc.*, 371 F. Supp. 2d 898, 902-03 (E.D. Mich. 2005). On appeal, the Sixth Circuit affirmed the district court's conclusion as to the lack of evidence of actual malice, *Compuware*, 499 F. 3d at 526-28, but found that the district court had erred as to the question of consent. According to the Sixth Circuit, fact questions remains on the issue of Compuware's consent to the publication of most or all of the report, because the objection by Compuware's CFO "that the ratings downgrade was unjustified" was an "indicat[ion] that Compuware did not agree with substantial portions of the report and, perhaps, that it did not want it to be published." *Id.* at 526.

Romero argues that this precedent establishes that a defendant's knowledge of a plaintiff's disagreement with a publication categorically precludes the possibility of implied consent. The Court disagrees. According to the Restatement (Second) of Torts, "[w]hether words or other conduct are reasonably to be interpreted as expressions of consent to the publication is to be determined by the reasonable inferences from the conduct in the in the light of the circumstances

surrounding it." Restatement (Second) of Torts, § 583 cmt. (c). In the Court's view, this is a correct statement of the law, with the plaintiff's disagreement with a defamatory publication being relevant to but not usually determinative of his consent thereto. The question of whether a plaintiff consents to a publication is not an inquiry into whether the publication would occur if the plaintiff had limitless power to shape the circumstances in which he acts. Instead, it is a question whether the plaintiff's actions were such that, under the circumstances as they really were, a reasonable person would regard it as only fair to permit the defendant to respond. As a result, a plaintiff's manifested disagreement with a statement, standing alone, does not preclude his consent to its publication, if he nevertheless deliberately instigates an interaction (with either the defendant or a third party) in the course of which the defendant would reasonably be expected to publish the statement.

Under this rule, implied consent to a defamatory publication will typically arise when a plaintiff requests a conversation or other proceedings for the purpose of discussing a specific topic, and the defamatory comment is then made during those proceedings and on that topic. Such was the case in *Schechet v. Kesten*, 3 Mich. App. 126 (1966), *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561 (1980), and *Medical Planning Consulting, Inc. v. St. Mary's Medical Ctr.*, No. 214018, 2000 WL 33418859 (Mich. App. June 13, 2000), which the Court cited in its grant of summary judgment. In the Court's view, *Compuware* is not to the contrary. In that case the Sixth Circuit addressed only the question of whether Compuware's prepublication review of the credit downgrade amounted to consent to its publication. The

district court had not mentioned or considered the overarching contractual relationship between the parties as part of the context in which the existence of consent should be determined, and the Court of Appeals made no attempt to do so. When viewed through this frame, the Sixth Circuit's conclusion in *Compuware* was clearly correct: Moody's proposed to publish a report on Compuware's business and sent a copy to Compuware, Compuware objected that the main conclusion of the report was "not warranted," and Moody's proceeded to publish the report anyway. On that version of the facts, Compuware obviously had done nothing to consent to the report's publication.

By contrast, in this case the evidence does not admit of any question of fact as to whether Romero's actions amounted to an initial consent to Buhimschi's publication of a response to his charges of scientific misconduct, or whether he failed to effectively withdraw that consent once given. The circumstances unquestionably indicate that Romero consented to some kind of response when he submitted his complaint to Wayne State – because by doing so he was invoking procedures that required notice to Buhimschi and an opportunity for her to respond. There is no indication that Wayne State's procedures gave Romero any sort of right to review and reject Buhimschi's response before it was passed on to the investigative committee, or that Romero ever asserted any right of this sort. Presumably he could have withdrawn part or all of his complaint entirely, and

thus withdrawn his consent to a response asa well. But of course he did not do so.[6]

Although the question is somewhat closer, the same can be said of the publications to Yale personnel and to the *BJOG* that remain at issue in this case. As noted in the Court's original Opinion and Order, when Romero agreed to act as complainant in the Wayne State proceedings he certainly would have contemplated that the investigatory committee's conclusions and recommendations would be made known to whatever institution Buhimschi was affiliated with, and would be used to try to prevent what he perceived as future improper attempts by her to publish the research without attributing authorship to him. But given the serious actions that Yale and the *BJOG* were being asked to take – monitoring Buhimschi for future academic misconduct and issuing a corrected statement of authorship, respectively – Romero could hardly have expected that either institution would act without at least considering whether there was another side to the story. Therefore, by submitting his complaint at Wayne State Romero also consented to some sort of response by Buhimschi to whatever institutions ultimately were apprised of the Wayne State committee's findings. Especially given that Buhimschi's actual response consisted of nothing more than a document that was already part of the record of the Wayne State investigation, the fact that Romero may have

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[6] The Court will consider below whether the subject matter of Buhimschi's specific communications to Yale personnel and the *BJOG* came within the scope of this consent. For the moment, the relevant question is whether Romero by his actions consented to a response that he regarded as false.

disagreed with some of its contents does not defeat this consent.

Even if Romero's broader interpretation of *Compuware* is the correct one, that is, even if the rule of *Compuware* is that implied consent to a publication is always defeated by the declarant's knowledge of the plaintiff's disagreement with the publication, the Court concludes that it would not control this case, because it is in intolerable tension with precedents from the Michigan courts. In concluding that the plaintiffs in *Schechet*, *Hollowell*, and *Medical Planning* had consented to the publications that they respectively complained of, the courts in those cases did not make explicit findings as to whether the defendants had known that the plaintiffs disagreed with the contents of the publications. Given the nature of those contents, this silence would be almost inconceivable if knowledge of the plaintiff's disagreement really could preclude consent. As noted, the defendants in *Schechet* stated that plaintiff, a doctor of osteopathy, had among other things engaged in "[g]ross mis-management of surgical cases," had forged another doctor's name on a patient's discharge documents, and was "obsessed with insecurity, hate, fear, and frustration" that had "warped his judgment" so that he was dangerous to those around him and to his profession. *Schechet*, 3 Mich. App. at 131-32. In *Hollowell* the defendant had stated that plaintiff had "lied about her employment and business background and experiences" and was "incompeten[t] in her profession." *Hollowell*, 100 Mich. App. at 575 n.3. And the plaintiff in *Medical Planning* had been accused of manipulating business records to reap an ill-gotten personal profit. *Medical Planning*, 2000 WL 33418859 at *2. In order to accept Romero's contentions, the

Court would first have to conclude that in each of these cases the parties did not raise, and the Michigan courts simply declined to comment on, the potentially dispositive question of the defendants' likely knowledge that the plaintiffs would not agree with these publications. Especially in light of the lack of any other Michigan case in which such a rule is mentioned, this is too much for the Court to swallow.[7]

Moreover, in the Court's view the Michigan rule is sounder than the rule Romero would extract from *Compuware,* and the Michigan courts would be more likely to reaffirm the former than to adopt the latter. It is highly desirable that people with disagreements be able to invite each other to civilized, orderly discussions of those disagreements, without such discussions doubling as snares for legal liability.

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[7] For a similar reason, the Court rejects another argument of Romero's: that implied consent should be held to confer at most a qualified immunity on defamatory publications, thus permitting liability if the defendant makes the publication knowing it is false, or with recklessness as to its truth or falsity. As a matter of policy, the Court is inclined to agree with Romero in this regard. There appears to be no good reason why a plaintiff's issuance of an invitation to a discussion of his disagreements with the defendant should function as an excuse for the defendant to fabricate all manner of falsehoods about the plaintiff. But if the defendant's state of mind might possibly defeat an implied-consent defense in this way, surely the Michigan courts would have discussed the possibility in *Schechet*, *Hollowell*, or *Medical Planning* Each of those cases involved defamatory publications that, if false, might well have been deliberately so. But the courts in those cases did not mention even in passing any qualification to the implied-consent privilege. The Court regards this as an implicit rejection of the arguments Romero makes here for such a qualification, and will not second-guess the Michigan courts on this matter.

Romero's proposed rule would prevent rather than facilitate such conversations.

In sum, the Court was cognizant when issuing the original Opinion and Order that Romero disputes the accuracy of Buhimschi's alleged defamations, and that Buhimschi had reason to know of this when she published them. On the facts of this case, however, Romero's instigation of disciplinary proceedings in which Buhimschi had a right to respond constituted implied consent even to a response that he disagreed with. Therefore, the Court will not disturb its ruling on this basis.

C. Scope of Consent

1. In General

Romero's remaining contention is perhaps his strongest: he urges that even if he did consent to some kind of response by Buhimschi, the defamations that she actually responded with were outside the scope of his consent. As noted above, whether consent has implicitly been given "is to be determined by the reasonable inferences from the conduct in the in the light of the circumstances surrounding it." Restatement (Second) of Torts, § 583 cmt. (c). The scope of the consent, and thus of the privilege, is determined similarly,

> by the language or acts by which [consent] is manifested in the light of the surrounding circumstances. If the person to whom the consent is given reasonably interprets the language used or the acts done as a consent to the publication of the defamatory matter to any

> person, at any time, in any manner and for any purpose, the publication however made is privileged. On the other hand, a consent may be limited to a publication to a particular person or at a particular time or for a particular purpose. If so, the publication is privileged only if made within those limitations.

Id. cmt. (d).

Although the Michigan Court of Appeals has stated in dicta that consent extends only to communications that are "relevant to the purpose for which consent was given," *Ramsey v. Speedway Superamerica, LLC*, No. 279034, at *4 (Mich. App. Aug. 14, 2008), the Michigan courts have not expressly adopted this rule of the Restatement. Nevertheless, the Court is well satisfied that the rule is part of the law of Michigan. It cannot be that consent to a defamatory remark is an all-or-nothing proposition – a plaintiff who invites a conversation at a specific time and about a specific topic does not therefore consent to defamatory remarks about an entirely different topic, or in an entirely different conversation. As Romero correctly notes, the consented-to comments in *Schechet*, *Hollowell*, and *Medical Planning* all took place in specific communications that were explicitly or implicitly requested by the plaintiff. In *Schechet* and *Hollowell* the publications also came in the specific forum in which the plaintiff requested that the conversation take place.

From these cases and from the rule as stated in the *Restatement (Second)*, the Court concludes that there are at least three axes along which a plaintiff may limit the scope of his consent to a defamatory

publication: (1) the subject matter that the invited publication may address, (2) the persons to whom it may be made, and (3) the time, place, and other "procedural" circumstances in which the statement may be published to those persons. For instance, if two co-employees are having disagreements about their work, and one of them requests a discussion of these differences in front of their supervisor, the requesting employee does not thereby consent to defamatory publications made to the supervisor behind the requesting employee's back, or made to other co-workers, or on a non-work-related topic.

2. Persons and Procedures Limitations on Romero's Consent

The last two factors in the scope of consent -- the persons to whom, and the circumstances in which, a plaintiff agrees a publication may be made -- can be addressed together in this case. Indeed, in its previous order denying a portion of the instant motion for reconsideration, the Court has already concluded that in one respect at least, Buhimschi's remarks fit within the scope of Romero's consent in these regards. Opinion and Order of April 2, docket no. 162, pp. 2-3. As explained above, Romero could hardly have expected that other universities and medical journals would refuse to publish Buhimschi's work on the basis of Wayne State's findings without requesting some kind of response from her. Since each of Buhimschi's publications was to Yale personnel and the *BJOG* occurred in an attempt to defend herself against the sanctions recommended in the Wayne State report, they are within the procedural scope of Romero's consent.

Romero nevertheless argues to the contrary, making much of the fact that, as a matter of Wayne State's procedural rules, Buhimschi was not permitted to raise new issues for the first time on an appeal from the committee's findings, and was otherwise permitted to appeal only limited issues. Because of Buhimschi's extremely limited participation in the investigation, much if not all of the defamatory matter in Buhimschi's Appeal Document was not brought before the committee as an initial matter, and thus fell afoul of this rule. Furthermore, her appeal document is essentially an attack on every aspect of the investigative committee's findings and recommendations. Romero therefore argues that he cannot be regarded as having consented to such a procedurally irregular publication.

This argument fails, as an initial matter, because it applies only to Buhimschi's initial submission of the appeal document to Wayne State, and any claim by Romero based on that publication is barred by the statute of limitations. The publications on which Romero's claims are actually based -- those at Yale and the *BJOG* -- were not within the Wayne State proceedings, and Wayne State's rules therefore cannot reasonably be interpreted as limiting the scope of Romero's consent to those responses.

Even were the initial submission at issue, however, the Court would be unable to adopt Romero's position. The Court agrees, of course, that by acting as complainant Romero did not consent to a response by Buhimschi outside the course of Wayne State's investigative proceedings and later attempts at enforcement. For instance, by instituting proceedings of which a formal record was kept, Romero might

reasonably be said not to have consented to Buhimschi's informally stopping by the homes or offices of the individual committee members to deliver an off-the-record defamatory response. But on the other hand, there is no sound reason to conclude that Romero's consent incorporated every detail of Wayne State's procedural rules for such investigations. Romero apparently does not contest that Buhimschi could in fact have submitted materials in her defense directly to the investigative committee, before it reached any conclusions.[8] There can be no question that such a response would have been within the scope of Romero's consent, in terms of the circumstances in which the response was made. That being the case, the Court discerns no material difference in circumstances between Buhimschi's submission of a response directly to the investigative committee, on the one hand, and her raising issues for the first time on appeal, on the other. In the Court's view, any procedural impropriety in Buhimschi's response was not so severe that a reasonable person would regard it as outside the bounds of what Romero should have expected in response to his complaint.

In addition, if Buhimschi *had* submitted a response directly to the investigative committee, she would presumably have had the procedural right to re-submit the same materials on appeal. Thus, it appears that Romero actually consented to the submission of an appeal document. Again, even if such an appeal would

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[8] Of course, even then Romero would only have consented to Buhimschi's filing of materials that were responsive to the complaint he was bringing. The Court will consider these subject-matter limitations on Romero's consent below.

ultimately be ineffective because Buhimschi's claims were procedurally defaulted, the Court sees no material reason why her failure to participate fully in the investigation should somehow defeat Romero's already-given consent to the appeal being filed.

3. Subject-Matter Limitations on Romero's Consent

It remains to be considered whether the subject matter of Buhimschi's accusations against Romero was within the scope of his consent. In this regard, Romero notes that many of the defamatory statements in Buhimschi's Appeal Document do not address the question whether Romero was entitled to authorship credit for the proteomics article, but instead allege that he engaged in abusive personal behavior or other scientific misconduct that, even if true, would not have warranted his removal from authorship.

The Court agrees that many of Buhimschi's written accusations do not meaningfully address the question of his entitlement to authorship credit on the proteomics article. As is explained below, however, the Court is unable to agree that Romero's implied consent was limited to a response on that topic only. Instead, they also included whether it was improper for Buhimschi *not to notify* Romero when she removed his name from the article. The Court concludes that Buhimschi's allegations, although broad, are nevertheless all responsive to this issue.

It is not clear whether Romero filed a written document to initiate the Wayne State scientific-misconduct inquiry process. The record does reveal, however, that after the initial "inquiry" phase

concluded, the investigative committee set forth three issues that it deemed worthy of further investigation. The first issue, in relevant part, was that

> [i]n the revision to the original [proteomics] manuscript, the names of [several doctors, including] Romero were deleted from the list of authors. None of the authors were informed by Dr. Buhimschi, the corresponding author, that their names were deleted from the list of authors and they were not provided with copies of the comments of the reviewers. Some of the authors that were originally listed did not see the revision to the original manuscript.

Scientific Misconduct Inquiry Report of Aug. 5, 2003, docket no. 126-4, p. 1.

Thus, although the main thrust of Romero's complaint was that Buhimschi had no grounds to remove him as an author, the inquiry report makes clear that her failure to notify him that he had been removed was also a significant topic of discussion. It is also clear from the record that Romero actively presented this to the committee as part of his complaints. When Romero appeared as the first witness before the investigative committee, he made an extensive opening statement which he had prepared in advance. A substantial portion of this opening statement focused on Buhimschi's failure to communicate with Romero in regard to the manuscript. Romero stated to the Wayne State committee that

> During the review of this [proteomics] work, communication among the authors stopped. Dr.

> Buhimschi was the corresponding author and after informing me that *The Lancet* was interested in the manuscript, would provide no further details about the comments of the reviewers and the status of the revised manuscript. I had to contact the journal to find out that the names of all individuals affiliated with the Perinatology Research Branch (four of seven authors) had been deleted from authorship and that the manuscript was in galley stage and about to be published. This was, of course, a shocking development to me and unlike anything I had experienced. Now having worked for months with Dr. Buhimschi and others on the manuscript, it was difficult to believe what I learned from the staff of *The Lancet*. In one of my telephone conversations with Dr. Charles Young, Senior Editor of *The Lancet*, he expressed surprise that Dr. Buhimschi, as corresponding author, had not communicated with me about the deletion of my name and that of others as were her responsibilities as the corresponding author for the manuscript.

Docket no. 95-5, pp. 8-9. He continued by saying that Buhimschi "became aware of the potential monetary value of this work, and that

> at least in part the genesis of the current difficulty is not the contribution or lack thereof of the individuals affiliated with the PRB to the manuscript submitted to *The Lancet*. If it were, I believe that Dr. Buhimschi would have communicated with us as to who the appropriate list of authors would be.

Id. at 9. At various times throughout his opening statement, Romero also highlighted Buhimschi's failure to reply to his continued efforts to assist in revising the manuscript.. *See id.* pp. 11, 21. Romero even went so far as to recount how, after he learned from the *BJOG* that he was not listed as an author on the proteomics article, he had told one of the *BJOG*'s editors "that it was my understanding that the guidelines for authors of *The Lancet* indicated that the corresponding author, in this case Dr. Irina Buhimschi, had an obligation to share the comments of the reviewers with the other coauthors" -- which she had not done. *Id.* at 27. He then told the investigative committee that "*The Lancet* had reaffirmed its policy that the corresponding author, in this case Dr. Irina Buhimschi, should communicate with all parties involved whether or not they are listed in the final version of the manuscript." *Id.* at 29.

In the Court's view, then, no reasonable jury could fail to conclude that Romero's actions as complainant should reasonably have led him to believe that Buhimschi would respond with an explanation of why she had refused or felt unable to communicate with him. The Court further concludes that, to the extent Buhimschi's defamatory statements did not deal directly with Romero's right of authorship, they are nonetheless responsive to this issue of her lack of communication with Romero. In explanation of why she removed Dr. Romero's from authorship of the *Lancet* manuscript, Buhimschi's appeal letter states that after her initial submission of the manuscript, which included Romero as an author, the journal's reviewers requested that it be significantly shortened. Appeal doc., ¶¶ 1.22-23. In shortening the article Buhimschi states that she removed the portions that

were attributable to Romero, which necessitated the removal of his name from authorship. *Id.* Buhimschi states that she did not inform Romero that he had been removed because (1) she felt that he had been rude to her and that she did not owe him this professional courtesy, and (2) given Romero's past actions, she was afraid that if she offended him further he would arrange for Buhimschi's husband to be kicked out of Wayne State altogether. *Id.*; *see also id.* p. 13 ("Given the improper actions taken by Dr. Romero, and his competitive publication without my knowledge, I did not feel I am [sic] obligated by collegiality to inform Dr. Romero and his employees of my decision not to include them as co-authors on a revised version of the manuscript which will not include their contribution."); p. 25. Elsewhere, Buhimschi states that

> [f]ollowing [Romero's] requests the Departmental leadership took actions which placed me and my husband in a vulnerable position. I was afraid initially to inform Dr. Romero of my decision to restructure the manuscript, to eliminate his instruction and not include him as a co-author on a revised manuscript knowing that he would take the very actions that he took.

Id. p. 25. She also claimed that "[a]s Dr. Romero had an abusive style, I was afraid of the consequences of an open dialogue with him on authorship matters at the time when my husband and I were seeking exit from WSU and new employment." *Id.* ¶ 5.6.4. The defamatory material in the other two publications is consistent with this explanation as well.

In sum, Buhimschi's narrations of various acts of alleged intimidation and misconduct by Romero are thus directly relevant to her explanation of why she felt unable to notify him that she was removing his name from authorship. Accordingly, their subject matter falls within the scope of Romero's consent to a response.

CONCLUSION AND ORDER

Romero has urged that under Michigan law, a plaintiff's consent to a defamatory publication cannot be implied if (i) the defamation had previously been published without consent, (ii) the defendant had reason to know that the plaintiff disagreed with the contents of the publication, or (iii) the publication was outside the scope of the plaintiff's consent. The Court concludes that the first two limitations are not part of Michigan law, and that even if the first one was, there is no fact question as to whether it would preclude a finding of consent in this case. The Court further concludes that, on this record, no reasonable jury could find that the publications Romero complains of in this case were outside the scope of the consent to publication he gave by acting as complainant in the Wayne State scientific-misconduct proceedings.

WHEREFORE, it is hereby **ORDERED** that plaintiff's motion for reconsideration of the Court's grant of summary judgment in favor of defendants is **DENIED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: August 10, 2009

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on August 10, 2009, by electronic and/or ordinary mail.

Alissa Greer
Case Manager

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL CASE NO. 06-10859

[Filed September 28, 2007]

ROBERTO ROMERO, M.D.,

Plaintiff,

v.

IRINA BUHIMSCHI, M.D., *et al.*,

Defendants.

HONORABLE PAUL V. GADOLA
U.S. DISTRICT JUDGE

ORDER

I. Background

Now before the Court are various objections to the Report and Recommendation of Magistrate Judge Donald A. Scheer. For the reasons stated below, the Court accepts Magistrate Scheer's recommendations.

Plaintiff Roberto Romero, M.D., filed a complaint alleging seven claims against the various Defendants Irina Buhimschi, M.D., Yale University ("Yale"), Carl Weiner, M.D., and the Royal College of Obstetricians and Gynaecologists ("RCOG"). All the counts relate to the alleged improper publication of an academic article of which Plaintiff Romero claims to be an uncredited author.

On May 22, 2007, Magistrate Judge Scheer issued a Report and Recommendation related to Defendants' motions to dismiss. In reviewing the motions, Magistrate Judge Scheer recommended that Plaintiff's Count I, alleging a violation of the LanhamTrademark Act, 15 U.S.C. § 1125(a) against all defendants, be dismissed; Count II, alleging a violation of an implied-in-fact contract against Buhimschi, proceed; Count III, a claim of negligence against Defendant Royal College of Obstetricians and Gynaecologists, be dismissed; Count IV, alleging that Defendant Carl Weiner tortiously interfered with Plaintiff's advantageous business relationship with the British Journal of Obstetrics and Gynaecology ("BJOG"), be dismissed; Count V, alleging defamation by Defendants Buhimschi and Yale University, be dismissed in part; Count VI, alleging defamation by Defendant Weiner, be dismissed; and Count VII, alleging that Defendant RCOG issued a false statement about the authorship of the disputed article that contained "express or implied false representations," be dismissed. Magistrate Judge Scheer also notified the parties that objections to the Report and Recommendation had to be field within ten days.

Plaintiff filed objections to the Report and Recommendation with respect to Counts I-IV and Count VII. Defendant Buhimschi filed objections as to Counts II and V. Defendant Yale University filed objections to Count V. All parties filed responses to the objections raised.

II. Legal Standard

The Court's standard of review for a magistrate judge's report and recommendation depends upon whether a party files objections. If a party does not object to the report and recommendation, the Court does not need to conduct a review by any standard. *See Lardie v. Birkett,* 221 F. Supp. 2d 806, 807 (E.D. Mich. 2002) (Gadola, J.). If a party does object to portions of the report and recommendation, the Court reviews those portions *de novo. Lardie,* 221 F. Supp. 2d at 807. The Federal Rules of Civil Procedure dictate this standard of review in Rule 72(b), that states, in relevant part:

> The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b).

Here, because the parties have filed objections, this Court reviews *de novo* those portions to which an objection has been made. *See Lardie,* 221 F. Supp. 2d. at 807. *De novo* review in these circumstances requires at least a review of the evidence before the magistrate judge; the Court may not act solely on the basis of a magistrate judge's report and recommendation. *See* 12 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 3070.2 (1997); *see also Hill v. Duriron Co.,* 656 F.2d 1208, 1215 (6th Cir. 1981). The Court may supplement the record by entertaining additional evidence, but is not required to do so. 12 Wright, Federal Practice § 3070.2. After reviewing the evidence, the Court is free to accept, reject, or modify the findings or recommendations of the magistrate judge. *See Lardie,* 221 F. Supp. 2d at 807. If the Court accepts a report and recommendation, the Court is not required to state with specificity what it reviewed; it is sufficient for the Court to state that it engaged in a *de novo* review of the record and adopts the report and recommendation. *See id*; 12 Wright, Federal Practice § 3070.2.

III. Analysis

The Court has reviewed the complaint as to each count, considered the evidence presented, the recommendation of Magistrate Judge Scheer, and the objections and responses filed.

A. Count I.

Magistrate Judge Scheer's report and recommendation concluded that Plaintiff's Lanham Trademark Act claim was foreclosed by the United States Supreme Court decision of *Dastar Corp. v. 20th*

Century Fox Film Corp., 539 U.S. 23 (2003). Plaintiff argues that the Magistrate Judge is incorrect because his claim is not merely one of plagiarism or failure to attribute authorship to Plaintiff but instead is a claim that Defendants provided false and misleading descriptions and representations that are likely to cause confusion regarding the paper in question. Plaintiff claims that Defendants falsely reported where the research underlying the paper was conducted, who approved the research, and how the research was funded.

The Court accepts the Magistrate's recommendation with respect to this claim for several reasons. First, Plaintiff does not have standing to bring suit on behalf of institutions or organizations that he believes should have received credit for conducting research or providing funding for the research. Second, despite Plaintiff's claims to the contrary, the Court agrees that Plaintiff's claim is barred by the Supreme Court precedent of *Dastar Corp.*, 539 U.S. 23 (2003). Numerous cases support this proposition. *See e.g.*, *Zyla v.* Wadsworth, 360 F.3d 243 (1st Cir. 2004)(finding that where the plaintiff had withdrawn her permission for the defendant to use her work in a textbook but the work was used anyway, there was no claim under the Lanham Act because the Act does not allow for claims of false authorship); *Radolf v. Univ. of Conn.*, 364 F. Supp. 3d 204, 222 (D. Conn. 2005)("In short, Dr. Radolf asserts that Defendants passed off his research as their own. And that type of claim, however styled, is barred by the language of the holding in Dastar."); *Thomas Publishing Co. LLC, v. Tech. Evaluation Centers, Inc.*, 2007 WL 2193964 (S.D.N.Y. July 27, 2007)(dismissing Plaintiff's Lanham Act claim where the plaintiff, like

Romero, argued that its claim was not merely "a simple allegation of copying" but alleging that the defendant affirmatively and falsely represented that the defendant had originated, developed and created the works in question such that there would likely be confusion); *National Business Development Services, Inc., v. American Credit Education & Consulting, Inc.*, 2007 WL 1500292 (E.D. Mich. May 23, 2007)(Zatkoff, J.)(finding that where defendants had taken some of the plaintiff's copyrighted written materials and then advertised, promoted, and offered those materials for sale, no claim was possible under the Lanham Act).

In the face of this precedent, Plaintiff's objections, despite the colorful and imaginative examples provided in an effort to demonstrate his point, fail to cite any case in support of his position, distinguishing his claim from those prohibited by the Supreme Court in *Dastar*. Accordingly, the objections as to the report and recommendation as to Count I will be overruled and Count I will be dismissed.

B. Count II

Magistrate Judge Scheer recommended that Plaintiff's claim, alleging that Buhimschi breahced an implied-in-fact contract, should not be dismissed. Defendant Buhimschi objects arguing that Plaintiff has failed to specifically plead the essential elements of an implied-in-fact contract. Buhimschi argues that Magistrate Judge Scheer erred in applying the recently abrogated "no set of facts" language set forth in *Conley v. Gibson*, 78 S. Ct. 99 (1957) to Defendants' motion to dismiss.

On May 21, 2007, one day before Magistrate Judge Scheer's Report and Recommendation was issued, the Supreme Court issued *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007). In *Twombly*, the Court overruled the 1957 "no set of facts" language of *Conley v. Gibson*, 78 S. Ct. 99 (1957), stating,

> The 'no set of facts' language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

Twombly, 127 S.Ct. 1959-60. Instead, the Supreme Court concluded that Federal Rule of Civil Procedure 8 requires the claimant to put forth "enough facts to raise a reasonable expectation that discovery will reveal evidence of [the requisite elements of the claim]." *Id.* at 1965.

In the present case, reviewing the evidence, the Court concludes that the change in the standard does not affect the validity of the Magistrate's conclusion. Magistrate Judge Scheer found that Plaintiff's assistance with the preparation of the manuscript had not been demonstrated to be part of any pre-existing duty and therefore could conceivably constitute adequate consideration for a separate promise on Defendant Buhimschi's part to list Plaintiff as a co-author of the article. That conclusion is correct. The Court will grant a motion for dismissal pursuant to Rule 12(b)(6) only in cases where the are simply not "enough facts to state a claim to relief that is plausible

on its face." *Twombly*, 127 S.Ct. at 1974. Plaintiff is not required to plead with specificity. *See* Fed. R. Civ. P. Indeed, the Court is required not only to accept all factual allegations as true, but also to draw all reasonable inferences in favor of the Plaintiff. *See Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir.1994) (*citing Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir.1976)). In the present case, Plaintiff has adequately plead a claim for an implied-in-fact contract under both the old "no set of facts" standard considered by Magistrate Judge Scheer, and under the *Twombly* standard.

C. Count III

Magistrate Judge Scheer recommended that Plaintiff's claim, alleging a claim of negligence against Defendant RCOG, should be dismissed because Plaintiff has failed to demonstrate that there was any legal duty owed by Defendant to Plaintiff based upon the publication standards of private organizations, organizations to which RCOG was admitted. The Court agrees. Plaintiff has failed to cite any authority in support of its position that the Michigan Supreme Court would find a legal duty owed to Plaintiff. To the contrary, in the only relevant case cited, *Adkins v. Mong*, 168 Mich. App. 726, 730 (1988), the Michigan Court of Appeals declined to find that a pharmacist had a duty to a customer based upon the standards set forth by the American Pharmaceutical Association. Plaintiff's assertion that the Magistrate Judge failed to consider the relevant factors when deciding whether a legal duty had arisen, *see Buczkowski v. McKay*, 441 Mich. 96, 100-101, n.3-n.5 (1992), does not change the outcome. This Court, even when considering the factors set forth, and in light of *Adkins*, fails to find

any support for the proposition that the Michigan Supreme Court would impose a legal duty upon Defendant.

D. Count IV

Magistrate Judge Scheer recommended that Plaintiff's claim for tortious interference with an advantageous relationship against Defendant Carl Weiner be dismissed. In so recommending, the Magistrate Judge found that just as Plaintiff had failed to demonstrate that the voluntary adoption of private standards of conduct creates a legal duty, the adoption also fails to establish a cognizable expectancy of an advantageous business relationship. Plaintiff has filed objections, arguing that the expectation was reasonable and was not illusory.

The Court rejects Plaintiff's arguments and concludes that Plaintiff has failed to allege a business relationship with "some degree of specificity" such that a future gain is not merely "wishful thinking" but instead is a "realistic expectation." *Behrend v. Bell Telephone Co.*, 363 A.2d 1152, 1160 (Pa. Super. Ct. 1982)(cited in *Schipani v. Ford Motor Co.*, 102 Mich. App. 606 (1981)). Plaintiff's claim of expectation based entirely upon the BJOG's adherence to the publishing standards does not allege "a specific and reasonable prospective economic advantage that was interfered with." *Schipani*, 102 Mich. App. at 622.

E. Count V

Magistrate Judge Scheer recommended that Defendants' motion to dismiss be granted as to Plaintiff's claims of defamation against Defendants

Buhimschi and Yale for all statements and republications occurring more than one year before this action was filed, pursuant to the Michigan statute of limitations.[1] Furthermore, the Magistrate Judge recommended that the motion be denied with respect to all other statements or republications because Plaintiff had sufficiently plead a claim for defamation under the liberal pleading requirements of Federal Rule of Civil Procedure 8.

Defendant Yale University objects to the Report and Recommendation's finding that Plaintiff has sufficiently plead defamation. In particular, Defendant argues that under Michigan law, a Plaintiff is required to plead defamation with specificity. *See Royal Palace Homes v. Channel 7*, 197 Mich. App. 48, 52 (1992); *Gonyea v. Motor Parts Fed'l Credit Union*, 192 Mich. App. 74, 77 (1991). Defendant also argues that the Magistrate Judge improperly applied *Conley v. Gibson*, 355 U.S. 41 (1957) in light of the *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

In finding that Plaintiff has sufficiently plead defamation against Yale under Fed. R. Civ. P. 8, Magistrate Judge Scheer relied upon *Suarez v. CBS, Inc.*, 23 F.3d 408 (6th Cir. 1994)(table case). Although *Suarez* does indicate that a Plaintiff need not plead defamation with specificity under the Federal Rules of Civil Procedure, *Suarez* has received no traction as precedent; no cases have cited *Suarez* for that point. However, several other Sixth Circuit cases since *Suarez* have found that a claim of defamation under Michigan law must be plead with specificity. *See*

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[1] No party has filed objections as to this recommendation.

Boladian v. UMG Recordings, Inc., 23 Fed. App'x 165 (6th Cir. 2005)(citing *Stencel v. Augat Wiring Sys.*, 173 F. Supp. 2d 669, 680 (E.D. Mich. 2001) and finding that the plaintiff's allegations were "not enough to satisfy the requirements of Michigan law, which requires that the elements of a claim of defamation be specifically pleaded"); *Kahlich v. City of Grosse Pointe Farms*, 120 Fed. App'x 580, 586 (6th Cir. 2005)(citing *Gonyea*, 192 Mich. App. 74, and stating that because the plaintiff "failed to 'specifically' plead to whom the individual defendants published the allegedly defamatory statements," the claim was subject to dismissal); *Michigan Dessert Corp. v. Baldwin Richardson Foods, Inc.*, Case No. 06-15726, 2007 WL 851001 (E.D. Mich. Mar. 15, 2007)(Cohn, J.)(citing *Royal Palace Homes*, 197 Mich. App. at 52, and finding that "Defamation claims must be plead with specificity.").Therefore, in light of the more recent case law, the Court finds that a claim for defamation under Michigan law must be plead with specificity.

Turning then to examine Plaintiff's claims in the instant case, reading the complaint as a whole, and considering the allegations under the new standard set forth in *Twombly*, 127 S.Ct. at 1965, Plaintiff has alleged with the necessary specificity Count V for defamation against Defendants. Although reading the paragraphs of the complaint in isolation, as Defendants appear to suggest, fail to reveal the necessary specificity, when read together, the allegations give the Defendants fair notice of the allegations, including the "who, what, and when" of the defamation claim. *See Rouch v. Enquirer & News of Battle Creek Michigan*, 440 Mich. 238, 272 (1992).

F. Count VI

The Report and Recommendation as to Count VI, defamation by Defendant Carl Weiner, recommends that the count be dismissed because the statements in question were made more than one year prior to the filing of the action. *See* M.C.L. § 600.5805 (1), (9). No party has filed objections to this portion of the report and recommendation. Nevertheless, the Court has reviewed the matter and finds that dismissal in accordance with the Report and Recommendation is appropriate.

G. Count VII

Finally, Magistrate Judge Scheer recommended that Plaintiff's claim against Defendant RCOG based upon its issuance of a Statement of Disputed Authorship in the April 2006 issue of the BJOG, be dismissed. The Magistrate Judge concluded that to the extent that Plaintiff relies upon BJOG's voluntary adoption of publication standards established by third party journalistic organizations to create a duty owed by BJOG to Plaintiff, Plaintiff had failed to state a claim upon which relief could be granted. The Magistrate Judge relied upon the same reasons stated with respect to Count III. Plaintiff has raised the same objections to Count VII as to Count III, and for the same reasons as stated with respect to Count III above, the Court rejects Plaintiff's arguments.

IV. Conclusion

For all of the foregoing reasons, after a *de novo* those portions to which an objection has been made,

IT IS HEREBY ORDERED that, to the extent not inconsistent with this order, the Report and Recommendation of the Magistrate Judge [docket entry #51] is **ACCEPTED AND ADOPTED** as the order of the Court.

IT IS FURTHER ORDERED that Defendant Buhimschi's Motion to Dismiss [docket entry #11] is **GRANTED** as to Count I, **DENIED** as to Count II, and **GRANTED IN PART** as to Count V.

IT IS FURTHER ORDERED that Defendant Yale University's Motion to Dismiss [docket entry #8] is **GRANTED** as to count I and **GRANTED IN PART** as to Count V.

IT IS FURTHER ORDERED that Defendant Weiner's Motion to Dismiss [docket entry #20] is **GRANTED** as to Counts I, IV, and VI.

IT IS FURTHER ORDERED that Defendant Royal College of Obstetricians and Gynaecologists Motion to Dismiss [docket entry #36] is **GRANTED** as to Counts I, III, and VII.

IT IS FURTHER ORDERED that Defendant Royal College of Obstetricians and Gynaecologists second Motion to Dismiss [docket entry #34], pursuant to Fed. R. Civ. P. 12(b)(2) is **DENIED AS MOOT**.

SO ORDERED.

Dated: September 28, 2007

s/Paul V. Gadola
HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

[Certificate of Service omitted]

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 06-10859

[Filed May 22, 2007]

ROBERTO ROMERO, M.D.,	)
	)
Plaintiff,	)
	)
v.	)
	)
IRINA BUHIMSCHI, M.D., et al.,	)
	)
Defendants.	)
	)

DISTRICT JUDGE PAUL V. GADOLA
MAGISTRATE JUDGE DONALD A. SCHEER

REPORT AND RECOMMENDATION

I. RECOMMENDATION:

I recommend that Defendant Buhimschi's Motion to Dismiss be granted as to Count I, denied as to Count II and granted in part as to Count V.

I recommend that Defendant Yale University's Motion to Dismiss be granted as to Count I and granted in part as to Count V.

I recommend that Defendant Weiner's Motion to Dismiss be granted as to Counts I, IV and VI.

I recommend that Defendant Royal College of Obstetrics and Gynecology's Motion to Dismiss be granted as to Counts I, III and VII.

II. REPORT:

A. Procedural History

This action was originally filed on February 27, 2006. On April 13, 2006, Defendant Yale University filed a Motion to Dismiss. That motion was stricken, and an Amended Motion to Dismiss by Yale University was filed on April 26, 2006. Plaintiff filed a Brief in Opposition to Yale's motion on May 1, 2006. Defendant Buhimschi filed a separate Motion to Dismiss on April 26, 2006, in which she adopted Yale's arguments with regard to Counts I (Lanham Act claim) and V (defamation). Plaintiff responded to that motion on May 3, 2006. Yale and Buhimschi filed reply briefs on May 10, 2006 and May 12, 2006, respectively. Defendant Weiner filed his Motion to Dismiss on May 15, 2006, also adopting Yale's position as to Count I. Plaintiff responded to that motion on June 1, 2006.

On May 16, 2006, Plaintiff filed a Motion to Amend/Correct Complaint, which motion was granted by Magistrate Judge Majzoub on June 16, 2006. Plaintiff's First Amended Complaint, adding Count VII

against Defendant Royal College of Obstetricians and Gynaecologists, was filed on June 20, 2006.

On July 27, 2006, Defendant Royal College of Obstetricians and Gynaecologists filed a Motion to Dismiss, joining in Yale's Rule 12(b)(6) challenge to Count I. Plaintiff responded in a brief filed on August 31, 2006, and a reply brief was filed on September 1, 2006.

On November 17, 2006, the district judge referred the dispositive motions to Magistrate Judge Majzoub for Report and Recommendation. On November 27, 2006, the case was reassigned to the undersigned magistrate judge.

B. Applicable Law and Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that a Complaint must be dismissed if it fails to state a claim upon which relief may be granted. In assessing a Motion to Dismiss, the Court "must construe the Complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Allard v. Weitzman, (In Re: DeLorean Motor Company), 991 F.2d 1236, 1239-40 (6th Cir. 1993) (citing Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir.), cert. denied, 498 U.S. 867 (1990)); see also, Conely v. Gibson, 355 U.S. 41 (1957). "A Complaint need not set down in detail all the particulars of a plaintiff's claim, but must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Lillard v.

Shelby County Board of Education, 76 F.3d 716, 726 (6th Cir. 1996) (citation omitted).

Although the standard is liberal, it requires more than the bare assertion of legal conclusions. In Re: DeLorean Motor Company, 991 F.2d at 1240; Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1998). The Complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Scheid, 859 F.2d at 436 (quoting Car Carriers, Inc. v. Ford Motor Company, 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985)).

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment will be granted when the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 323 (1986). The Court must consider all pleadings, affidavits, and admissions on file and draw all justifiable inferences in favor of the party opposing the motion. Smith v. Hudson, 600 F.2d 60, 64 (6th Cir.), cert. dismissed, 444 U.S. 986 (1989). The moving party has the burden of showing the Court that no genuine issues of material fact remain. Agristor Financial Corp. v. Van Sickel, 967 F.2d 233, 236 (6th Cir. 1992). However, Rule 56(e) states that the non-moving party has the burden of setting forth "specific facts showing that there is a genuine issue for trial," or else a judgment for the moving party will be entered.

C. Factual History

Plaintiff, Roberto Romero, M.D., is a physician specializing in maternal-fetal medicine. At all times relevant to this case, he was Chief of the Perinatology Research Branch ("PRB") of the National Institute of Child Health and Human Development ("NICHD"), a tenured member of the National Institutes of Health ("NIH"), and a citizen of the State of Michigan. The PRB is one branch of the NICHD's intramural division, and is housed at the Detroit Medical Center ("DMC"), a clinical campus of Wayne State University ("WSU") in Detroit, Michigan.

Defendant, Irina Buhimschi, M.D. ("Buhimschi"), is a faculty member and full-time employee of Defendant Yale University ("Yale"), and is a citizen of the State of Connecticut. She is employed at the Department of Obstetrics and Gynecology and Reproductive Sciences at Yale University School of Medicine in New Haven, Connecticut. Prior to moving to Yale, in July 2003, Buhimschi was an assistant professor at WSU from July 1, 2001 to June 26, 2003.

Defendant, Yale University, is governed by Yale Corporation, established and maintained under the laws of the State of Connecticut.

Defendant Carl Weiner is a citizen of the State of Kansas, and is employed by the Department of Obstetrics and Gynecology, University of Kansas School of Medicine, in Kansas City, Kansas.

Defendant Royal College of Obstetricians and Gynaecologists is a British Corporation operating in London, England. It publishes a journal entitled *The*

British Journal of Obstetrics and Gynaecology: An International Journal.

The First Amended Complaint alleges that Plaintiff and Buhimschi collaborated on certain research in the subject of "Proteomics," which refers to the identification of proteins contained in biological materials in the aggregate, rather individually. Plaintiff alleges that the collaborative research was conducted at WSU by himself, Buhimschi and other members of the PRB. The collaborative research was conducted pursuant to protocols approved by the Institutional Review Board ("IRB") of WSU and/or NICHD. The research conducted by Plaintiff and Buhimschi (and others) resulted in a manuscript that was submitted to the British Medical Journal, *The Lancet*, for publication in November 2002. An abstract of the Proteomics data was also submitted and accepted for oral presentation at a plenary session of the annual meeting of the Society for Maternal-Fetal Medicine ("SMFM"). As required by *The Lancet*, Buhimschi submitted a description of the contribution made to the research by each of her collaborators to justify authorship. Buhimschi described Plaintiff's contribution as "participated in the design of the study, supervised the clinical assessments and assisted with the interpretation of data and preparation of the paper." Plaintiff, Buhimschi and others were listed as authors on the published abstract. In February 2003, Buhimschi allegedly received a favorable response from *The Lancet*, but several manuscript revisions were requested. Buhimschi revised the manuscript, deleting certain data and omitting Plaintiff and other researchers as authors. *The Lancet*, however, would not publish the

article until the authorship dispute was resolved, and Buhimschi withdrew the manuscript.

Plaintiff filed allegations of scientific misconduct against Buhimschi with WSU. Attempts by WSU to resolve the conflict informally were unsuccessful. After an inquiry, an investigating committee was appointed. The committee ultimately found Buhimschi guilty of scientific misconduct. The committee report was issued in October 2004, and the finding was communicated to Yale. Buhimschi appealed the finding of scientific misconduct in January 2005. In connection with that appeal, she submitted a 31 page written submission together with 114 exhibits on January 20, 2005. Plaintiff maintains that Buhimschi launched personal attacks upon him and other WSU officials. Buhimschi's appeal was denied on February 16, 2005, and the finding of scientific misconduct became final.

Plaintiff alleges that, shortly after Buhimschi moved to Yale, in July 2003, senior officials at Yale became aware of the dispute over the authorship of the Proteomics manuscript, and the fact that WSU was investigating Buhimschi for scientific misconduct. At some point after October 2003, Buhimschi submitted a manuscript describing the research conducted at WSU in collaboration with Plaintiff to *The British Journal of Obstetrics and Gynaecology* ("BJOG"). The manuscript was accepted for publication on June 16, 2004, and published in the February 2005 issue of the BJOG. The "setting" of the study was described as a "North American University," and the only affiliations cited in the article for Buhimschi was Yale. On January 26, 2005, immediately after the article became available in electronic form, Yale issued a press release to inform the scientific committee that

"Yale researchers" had made significant discoveries. Plaintiff maintains that those discoveries were made at WSU and the PRB while Buhimschi was an assistant professor at WSU, and that Yale had no connection whatever with the findings.

D. Count I

In Count I of the First Amended Complaint, Plaintiff maintains that each of the Defendants violated Section 43(a) of the Lanham Trademark Act, 15 U.S.C. §1125(a). Specifically, he alleges that Buhimschi engaged in "reverse passing off" of the research she conducted (with Plaintiff and others) at WSU as findings made at Yale by "Yale researchers." Plaintiff further alleges that this reverse passing off was conducted with the knowledge and approval of Yale and its agents, and in furtherance of Yale's interests and business. The reverse passing off was accomplished by: (a) "misrepresenting the research and findings in the BJOG article as research that was conducted at Yale, by Yale faculty, without any reference whatsoever to the PRB or the Plaintiff and other PRB members, and (b) by issuing a press release promoting the findings as the work of "Yale researchers" and a "Yale team" at Yale. (First Amended Complaint, Paragraph 118). Plaintiff alleges that the actions by Buhimschi and Yale were deliberate and calculated to deceive the scientific community about the origins of the research, and unjustly to enrich themselves at the expense of Plaintiff, WSU and the PRB. (First Amended Complaint, Paragraph 119). He further asserts that the conduct by Buhimschi and Yale was wilful and done in bad faith. (First Amended Complaint, Paragraph 128). Plaintiff further alleges that Weiner

"was fully complicit in and assisted with this reverse passing off . . ." and that BJOG sold the article in interstate commerce with full knowledge that it contained false and misleading statements and descriptions of fact concerning the underlying research.

Defendant Yale University maintains that Plaintiff's First Amended Complaint fails to state a claim for "reverse palming off" under Section 43(a) of the Lanham Act. All of the other Defendants have joined in that position and adopted the same analysis. Yale cites Dastar Corp. v. 20th Century Fox Film Corp., 539 U.S. 23 (2003) for the proposition that Section 43(a) does not provide a cause of action for reverse palming off of intellectual property. In that case, 20th Century Fox Film Corp. was granted exclusive television rights to a copyrighted book by General Dwight D. Eisenhower about World War II. Fox arranged for Time, Inc., to produce a "Crusade in Europe" television series based on the book, and Time assigned its copyright in the series to Fox. Fox failed to renew the copyright on the television series, which expired in 1977, leaving the material in the public domain. In 1988, Fox reacquired the television rights to "Crusade in Europe", including the right to distribute the television series on video. In 1995, Dastar released a video set which it produced from tapes of the original version of the Fox television series, and marketed the product as its own for a substantially lower price. Fox initiated a legal action, alleging, in part, that Dastar's sale of its collection without proper credit to the original series constituted reverse passing off in violation of Section 43(a) of the Lanham Act. The district court granted summary judgment to Fox, and was affirmed by the 9th Circuit

Court of Appeals. The Supreme Court, however, reversed, holding that Section 43(a) does not prevent the unaccredited copying of an uncopyrighted work. The Court examined the purpose of the Lanham Act, and concluded that the statutory phrase "origin of goods" referred only to "the producer of the tangible product in the marketplace . . .." Dastar, 539 U.S. at 32.

> [A]s used in the Lanham Act, the phrase "origin of goods" is in our view incapable of connoting the person or entity that originated the ideas or communications that "goods" embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.

Id. The Court declined to accord special treatment to communicative products under the provisions of the Lanham Act because it would lead "to conflict with the law of copyright, which addresses that subject specifically." 539 U.S. at 33.

> Reading "origin" in Section 43(a) to require attribution of uncopyrighted materials would pose serious practical problems. Without a copyrighted work as the base point, the word "origin" has no discernable limits.
>
> * * *
>
> In many cases, figuring out who is in the line of "origin" would be no simple task.
>
> * * *

> We do not think that the Lanham Act requires this search for the source of the Nile and all its tributaries.

Dastar, 539 U.S. at 35.

> In sum, reading the phrase "origin of goods" in the Lanham Act in accordance with the Act's common-law foundations (which were not designed to protect originality or creativity), and in light of the copyright and patent laws (which were), we conclude that the phrase refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods. Cf. 17 U.S.C. §202 (distinguishing between a copyrighted work and "any material object in which the work is embodied"). To hold otherwise would be akin to finding that Section 43(a) created a species of perpetual patent and copyright, which Congress may not do. See, Aldred v. Ashcroft, 537 U.S. 186, 208, 123 S.Ct. 769, 154 L.Ed. 2nd 683 (2003).

539 U.S. at 37 (emphasis in original).

In response to Yale's arguments, Plaintiff takes issue with the proposition that the Supreme Court in Dastar held that Section 43(a) of the Lanham Act does not provide a cause of action for reverse passing off of intellectual property. He relies upon the observation in the opinion that Fox's claim "would undoubtedly be sustained if Dastar had bought some of New Line's Crusade videotapes and merely repackaged them as its own." 539 U.S. at 31. Plaintiff concedes that the Court's interpretation of the term "origin of goods" was

that it "refers to the producer of the tangible goods that are offered for sale, and not the author of any idea, concept, or communication embodied in those goods." (Plaintiff's Response, page 11 (quoting Dastar, 539 U.S. at 37)). Nonetheless, he argues that "the Court said absolutely nothing about the origin of intellectual property in a geographical or associational sense . . .." Id. From that statement, I take it that Plaintiff contends that the Lanham Act provides a remedy for the "geographical or associational" origin of intellectual property, but not for the "person or entity that originated the ideas or communications."

I find Plaintiff's argument very strange indeed. It strikes me as highly unlikely that a statute which provides no cause of action to a living, breathing author of ideas or communications would afford protection to the geographical region or associates of that author. Sorting out such entanglements is precisely the "search for the Nile and all its tributaries" that the Court in Dastar took pains to avoid. Furthermore, Plaintiff maintains this action as an individual, not as ambassador for a region or as representative of an association. As Defendant Yale has correctly observed, Plaintiff lacks standing to assert Lanham Act claims on behalf of others. See Frisch's Restaurants, Inc. V. Elby's Big Boy of Steubenville, Inc., 670 F.2d 642, 649 (6th Cir. 1982) (requiring a "reasonable basis for the belief that Plaintiff is likely to be damaged.").

In its reply brief, Yale maintains that Plaintiff's "repackaging" allegation remains, at its essence a claim for failure of attribution. Defendant argues that the "repackaging" discussed in the portion of the Dastar decision relied upon by Plaintiff was merely a

description of a classic reverse passing off scenario in which "company A puts a product on the market under A's name and the public comes to associate the product with A. Company B then takes the product, removes A's name, and replaces it with B's name, thus confusing or deceiving the public about the product's source." (Yale Reply Brief, page 1).

The example employed by Justice Scalia in Dastar involved the mere repackaging of a tangible product (videotapes) in the marketplace. That such circumstances would support a Lanham Act claim is of no benefit to Plaintiff here, who seeks to stretch the scope of Section 43(a) protections to include the geographical or associational origins of ideas or communications that "goods" in the marketplace might embody or contain. I agree with Yale that Plaintiff's purported effort to protect the geographical or associational "origin of goods" is simply another form of failure of attribution claim.

> But as used in the Lanham Act, the phrase "origin of goods" is in our view incapable of connoting the person or entity that originated the ideas or communications that "goods" embody or contain. Such an extension would not only stretch the text, but would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.

Dastar, 539 U.S. at 32-33. Plaintiff's arguments notwithstanding, the clear message of Dastar is that the phrase "origin of goods" in the Lanham Act does not require attribution of uncopyrighted materials on any basis, personal, geographical or associational.

> In many cases, figuring out who is in the line of "origin" would be no simple task.
>
> * * *
>
> We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries.

Plaintiff asserts that "[t]he U.S. Supreme Court cannot have meant to place its *imprimatur* on this kind of thievery by intending 'repackaging' to be interpreted so narrowly and literally as to apply only to the vehicle for the intellectual property and not to the intellectual property itself." I am satisfied, however, that the Court meant what it said - that the Lanham Act was not designed to protect originality or creativity (unlike copyright and patent laws), and that the phrase "origin of goods" in Section 43(a) "refers to the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept or communication embodied in those goods." Dastar certainly is not an *imprimatur* for plagiarism - it is simply a declaration that the Lanham Act is not a proper vehicle for combating it.

Accepting all the allegations in the First Amended Complaint as true for purposes of analysis, I find that the Lanham Act claim (Count I) against Defendant Yale University fails to state a claim upon which relief may be granted, and that it must be dismissed. Because the Count I claims asserted against the remaining Defendants, all of whom have adopted Yale's arguments, are untenable for the same reasons, I recommend that their respective Motions to Dismiss be granted as to Count I as well.

E. Count II - Implied-in-Fact Contract

Count II of the First Amended Complaint alleges that Buhimschi breached an Implied in Fact Contract under which she had agreed to list Plaintiff and other PBR members involved in the collaborative research "as co-authors on any scientific articles published in peer review journals describing the collaborative research and the results obtained by that research, and accredit their affiliation with PRB." (First Amended Complaint, Paragraph 131). Plaintiff claims that the "actions, understandings and agreements of Buhimschi" and himself created the implied-in-fact contract. (Id.).

At the outset, it must be observed, once again, that Plaintiff has filed this action as an individual, and nothing in the First Amended Complaint establishes standing on his part to represent PRB or any other individual or entity. "A contract is implied-in-fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them . . .." Ford v. Blue Cross and Blue Shield of Michigan, 150 Mich.App. 462 (1986).

> The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. An implied contract must also satisfy the elements of mutual assent and consideration.

Mallory v. City of Detroit, 181 Mich.App. 121 (1989). (Citations omitted). In this case, Defendant Buhimschi

rightly observes that an implied contract in fact requires the same elements as an express contract. (Defendant's Brief, Page 3). Buhimschi argues that the First Amended Complaint fails to state a claim because it does not allege facts sufficient to establish the elements of consideration and mutual assent. (Defendant's Brief, Pages 3-4). Plaintiff is dismissive of Defendant's consideration argument. He asserts that his allegations make it "crystal clear" that he and Buhimschi collaborated on clinical research and that Plaintiff provided Buhimschi with the very materials and resources without which the work could not have been performed, and that he "contributed to the design of the research and the interpretation of the results." (Plaintiff's Brief, Page 7).[1]

> A learned judge [Cardozo, C.J., in Allegheny College v. Nat'l Chautaugua Co. Bank, 246 N.Y. 369, 159 N.E. 173 (1927)] has identified the three elements which must occur before a promise is supported by consideration.
>
> > (a) The promisee must suffer legal detriment; that is, do or promise to do what he is not legally obligated to do; or refrain from doing or promise to refrain from doing what he is legally privileged to do.
> >
> > (b) The detriment must induce the promise. In other words the promisor

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[1] The parties' briefs cite references to the original Complaint The case is currently at issue, however, on Plaintiff's First Amended Complaint.

> must have made the promise because he wished to exchange it at least in part for the detriment to be suffered by the promisee.
>
> (c) The promisee must induce the detriment. This means in effect . . . that the promisee must know of the offer and intend to accept.

Lawrence v. Ingham County Health Department, 160 Mich.App. 420, 408 N.W. 2nd 461 (1987). [Footnotes omitted].

The First Amended Complaint asserts that Plaintiff's claims arise from collaborative research with Buhimschi and others. Plaintiff, a physician subspecializing in maternal-fetal medicine, was at all relevant times the chief of the Perinatology Research Branch ("PRB") of the National Institute of Child Health and Human Development ("NICHD"), and a tenured member of the National Institutes of Health ("NIH"). (Amended Complaint, Paragraph 1). His main job was to "formulate, develop, and execute a research agenda for the PRB to fulfill its mission." (First Amended Complaint, Paragraph 25). The collaborative research in question was done pursuant to protocols approved by Wayne State University ("WSU") and NICHD. (First Amended Complaint, Paragraph 32). Plaintiff alleges that the research could not have been done independent of PRB. A fair reading of the First Amended Complaint suggests that the research in question was conducted pursuant to an express contract. The claim asserted in Count II, however, is premised upon a contract implied-in-fact and pertaining to an article written about the completed

collaborative research. In his response brief, Plaintiff argues that the required consideration for Buhimschi's alleged promise to designate him as co-author of the article was his contribution to the underlying research. (Plaintiff's Brief, Page 7).

Buhimschi argues that Plaintiff's contribution to the collaborative research could not serve as consideration for a separate, implied-in-fact contract between himself and Buhimschi regarding attribution in any article describing the project and its results. (Defendant's Reply Brief, Page 2, Footnote 1). I agree.

The "consideration" described in Plaintiff's Response, that is, his contribution to the collaborative research, was the fulfillment of his obligation under the agreement for that project itself. Romero was simply performing his duty to his employer, PRB, and to his fellow researchers to contribute to the project, in exchange for their promise to contribute as well. Under Michigan law, "it is well settled that doing what one is legally bound to do is not consideration for a new promise." Detroit Edison Co. v. Osburn Trucking, Inc., 2001 WL 1167171 (unpublished) (quoting Yerkovich v. AAA, 461 Mich. 732, 740 (2000); citing Puett v. Walker, 332 Mich. 117, 122 (1952)). The principle applies whether the pre-existing duty is statutory, Richmond v. Catholic Social Services, 2004 WL 1416266 (unpublished) (citing General Aviation, Inc. v. Capital Region Airport Authority (on remand), 224 Mich.App. 710, 715 (1997)), or whether it is contractual, Yerkovich, 461 Mich.App. 732 (2000). Furthermore, it applies whether the alleged implied in fact contract is characterized as a modification of an existing express agreement, Yerkovich, supra, or a new and independent agreement, Puett, supra. Thus,

I conclude that the only "consideration" identified by Plaintiff in his reply brief was the performance of his obligation under the research collaboration agreement and his employment agreement with PRB. Such performance is not sufficient consideration to support a second contract relating to the scholarly publication of the results of the research.

Buhimschi also argues that the essential element of mutuality is lacking in the alleged implied in fact contract. Nothing identified by Plaintiff in his brief describes any obligation undertaken by Romero in exchange for the alleged promise by Buhimschi to name him as a co-author of the article. Absent such mutuality of obligation, no contract, express or implied, could exist. Johnson v. Douglas, 281 Mich. 247, 256 (1937) (mutuality of obligation is an essential element of every contract).

Plaintiff asserts in his brief that Buhimschi "manifested her agreement" to designate him as a co-author "by de facto making Plaintiff an author first of an abstract and then of the manuscript submitted to The Lancet . . .." Romero claims that such conduct demonstrates that "there was a meeting of the minds over the question of authorship." (Plaintiff's Brief, Page 7).

Buhimschi argues that, under Michigan law, "a plaintiff must adequately plead mutual assent and consideration in order to establish the existence of a valid contract capable of being breached." She cites Lawrence v. Ingham County Health Department, 160 Mich.App. 420 (1987). In that case, the trial court found that the plaintiff failed to state a cause of action for breach of contract and granted summary

disposition in favor of the defendant. "The trial court concluded that plaintiff failed to plead facts that would support a finding of adequate consideration and that plaintiff's contract claim must therefore fail." 160 Mich.App. at 463. The Court of Appeals determined that, "[i]n order for [the plaintiff's] promise to rise to the level of consideration sufficient to support a contract implied in fact, . . . that promise must be of some value to defendant. . .." In Lawrence, plaintiff asserted that her promise to follow medical advice was consideration for the defendant clinic's promise to render such advice. The Court of Appeals upheld the dismissal on the ground that the defendant gained no benefit from the plaintiff's promise, so that her acceptance of the medical advice could not be deemed consideration sufficient to form a contract. 160 Mich.App. at 425.

In the case at bar, the only consideration identified by Plaintiff in his Brief in Response to Buhimschi's Motion to Dismiss is Romero's work in furtherance of the collaborative research. In addition to being part of his employment obligation to "PRB" Plaintiff's work on the research was exchanged for the work of Buhimschi and others on the same project. It could not, therefore, constitute adequate consideration for an entirely new promise such that a separate implied-in-fact contract could arise with respect to the scholarly article based upon the research results. Thus, under Michigan pleading requirements, dismissal might be warranted. But Michigan procedural rules do not apply in this case.

While a court siting in diversity applies the substantive law of the state in which it sits, procedural matters are governed by the Federal Rules of Civil

Procedure. Fed.R.Civ.P. 8 does not require a detailed statement of "facts" giving rise to a "cause of action." The essential requirement of the rule is that a Complaint must provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 78 S.Ct. 99, 355 U.S. 41 (1957).

> Implicit in this passage is the notion that the rules do contemplate a statement of circumstances, occurrences, and events in support of the claim being presented. Of course, great generality in the statement of these circumstances will be permitted as long as the defendant is given fair notice of what is claimed; nonetheless, Rule 8(a)(2) does require that the pleader disclose adequate information concerning the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.

Wright and Miller, Federal Practice and Procedure, Civil 3rd Section 1215. At Paragraph 49 of the First Amended Complaint, Plaintiff quotes Buhimschi as stating that he (Plaintiff) "participated in the design of the study, supervised the clinical assessments, and assisted with the interpretation of data and preparation of the paper." In assessing a Motion to Dismiss, the Court "must construe the Complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Allard v. Weitzman, (In Re: DeLorean Motor Company), 991 F.2d 1236, 1239-40 (6th Cir. 1993) (citing Meador v. Cabinet for Human Resources, 902

F.2d 474, 475 (6th Cir.), cert. denied, 498 U.S. 867 (1990)); see also, Conely v. Gibson, 355 U.S. 41 (1957). Romero's assistance with the preparation of the scholarly manuscript has not been shown to have been undertaken as part of a pre-existing duty. Accordingly, it could conceivably constitute adequate consideration for a separate promise on Buhimschi's part to list Romero as co-author of the article. Affording Plaintiff the full benefit of the Rule 12(b)(6) policy, and the most liberal interpretation of the First Amended Complaint, I am not prepared to conclude that there is no set of facts which could support a recovery. Accordingly, I must recommend that Buhimschi's Motion to Dismiss be denied as to Count II. If, after discovery, there is no evidence to support an essential element of Plaintiff's implied-in-fact contract claim, Buhimschi may file a Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56.

F. Count III

Count III of the First Amended Complaint asserts a claim of negligence against Defendant Royal College of Obstetricians and Gynaecologists. The negligence claim relates to RCOG's publication in its journal, *The British Journal of Obstetrics and Gynaecology* ("BJOG"), of the article submitted to it by Buhimschi. RCOG maintains that Plaintiff's negligence claim is simply a poor substitute for a defamation action. It is quite clear, however, that Plaintiff is asserting in Count III a claim of negligence.

Defendant cites numerous cases in which courts have refused to recognize claims of "negligent publication" on First Amendment grounds. In Winter v. G.P. Putman's Sons, 938 F.2d 1033 (9th Cir. 1991),

the Ninth Circuit Court of Appeals held that a book publisher has no duty to investigate the accuracy of the contents of a book which it published, and that the plaintiff could not recover against the publisher under a negligence theory. The basis of that holding was the court's conclusion that a legal duty to the Plaintiff is an essential element of a negligence claim. Citing opinions from many jurisdictions, the court noted that the "cases uniformly refused to create this duty." Winter, 938 F.2d at 1037. Included in the cited cases was Lewin v. McCreight, 655 F.Supp. 282 (E.D. Mich. 1987) in which Judge Churchill determined that neither the Michigan Products Liability Statute nor the common law of this State imposes a duty upon a publisher to warn of "defective ideas" in a book published by it but written by a third person. In response, Romero asserts that:

> Plaintiff is not suing BJOG for negligence because of any inaccuracies in the text of the Proteomics article - that is, in the ideas or results reported. He is suing because BJOG published a manuscript knowing its authorship was disputed without even contacting him to hear his version of the facts on which [Defendant's editor] relied, and then failed to retract the article or correct information it was told was false.

(Plaintiff's Brief Opposing Defendant Royal College of Obstetricians and Gynecologists pursuant to Fed.R.Civ.P. 12(b)(6), pages 12-13).

Plaintiff concedes that his claims against BJOG cannot survive a challenge under Fed.R.Civ.P. 12(b)(6) unless the conduct of the Defendant violated a legal

duty owed to him. He attempts to establish the existence of that duty in two ways. First, he maintains that the BJOG editorial staff violated the *Uniform Requirements for Manuscripts Submitted to Biomedical Journals ("Uniform Requirements")* promulgated by the International Committee of Medical Journal Editors. (Plaintiff's Exhibit 26). He invokes that portion of the requirements providing that individuals who submit manuscripts for publication must list all those who qualify for authorship. Plaintiff's theory is that BJOG, having adopted the standards, had a duty to ensure that the guidelines were met. Plaintiff acknowledges that the duty of a scientific journal is normally discharged by "asking authors to sign and Author Guarantee Form." (See Defendant's Exhibit C). BJOG did obtain such a guarantee form from Buhimschi. Plaintiff, however, argues that, having been placed on notice that the authorship of the manuscript submitted by Buhimschi was disputed, Defendant had an additional duty under the Uniform Standards to investigate and resolve the authorship dispute, or to withhold publication until the dispute was otherwise resolved.

Plaintiff further bases his negligence claim upon BJOG's membership in the World Association of Medical Editors ("WAME") and the Committee on Publication Ethics ("COPE"), each of which has adopted standards and practices to be observed by scientific journals. Plaintiff notes that *The Lancet,* which is also a member of WAME and COPE, declined to publish the first Buhimschi manuscript until the authorship dispute was resolved. He further notes that, after he demanded a correction/retraction from BJOG, the Defendant consulted COPE, which opined that the article should not have been published before

the authorship dispute was resolved. (Plaintiff's Exhibit 29).

Plaintiff maintains that courts generally hold members of a calling to the standards and practices accepted by that calling, unless the standards deviate from reasonable practice. He cites T.J. Hooper v. Northern Barge Corp., 60 F.2d 737 (1932) in which the Second Circuit imposed liability upon the operators of tugboats, based upon their failure to equip the vessels with radios capable of receiving weather reports. The court imposed liability for the weather related loss of barges and cargo, despite the fact that most tugboat operators did not equip their boats with radios. I find Plaintiff's argument unpersuasive. In Hooper, the defendant's legal duty to the plaintiffs arose in the context of a direct business relationship. The law of contract imposed the requirement that the vessels be sufficiently seaworthy to fulfill the undertaking. Judge Hand considered, and rejected the industry standard as a measure of seaworthiness.

In the case at bar, Plaintiff urges this court to find that the publication standards of private organizations to which Defendant RCOG voluntarily subscribed actually created a legal duty to Plaintiff. A federal court sitting in diversity must apply the substantive law of the forum state. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In Michigan, the existence of a legal duty is a question of law. Beaudrie v. Henderson, 465 Mich. 124 (2001). Plaintiff has cited no Michigan statute or court decision supporting his conclusion that the voluntary adoption of private standards of conduct create a legal duty. There is, however, Michigan case law to the contrary. In Adkins v. Mong, 168 Mich.App. 726, 730 (1988), the plaintiff argued that a pharmacist

owed a customer a legal duty to monitor drug usage, relying upon the standards of practice adopted by the American Pharmaceutical Association and upon an article published in a professional periodical. The court found that no such duty arose by reason of such non-legal authorities. The court declined to find a legal duty despite the fact that a direct commercial relationship existed between the pharmacist and the customer. In the case at bar, Plaintiff assumes the existence of a duty in the absence of any such relationship. In my view, his argument is even weaker than that rejected by the Michigan Court of Appeals in Adkins. I conclude that no legal duty to Plaintiff arose by reason of RCOG's voluntary adoption of private publication standards. Alternatively, Plaintiff argues that RCOG owed him a duty of reasonable care as a matter of public policy. He reminds the court of its responsibility to continue the development of the common law. In following the mandate of Erie R.R. Co. v. Tompkins to apply the substantive law of the forum, a federal court "must follow the decisions of the state's highest court when that court has addressed the relevant issue." Talley v. State Farm Fire and Casualty Co., 223 F.3d 323, 326 (6th Cir. 2000). When the State Supreme Court has not yet decided a particular issue, the federal court must "anticipate how that court would rule." Imperial Hotels Corp. v. Dore, 257 F.3d 615, 620 (6th Cir. 2001) (quoting Bailey Farms, Inc. v. NOR-AM Chem. Co., 27 F.3d 188, 191 (6th Cir. 1994). In doing so, the court must consider decisions of a state's intermediate appellate courts unless it is "convinced by other persuasive data that the highest court of the state would decide otherwise." West v. AT&T Co., 311 U.S. 223, 237 (1940); see also, Comm'r v. Bosches Estate, 387 U.S. 456, 465 (1967). As stated above, an intermediate appellate court of the

State of Michigan has determined that non-legal standards of conduct adopted by private institutions impose no legally enforceable duty. Plaintiff has offered no persuasive evidence or argument to suggest that the Michigan Supreme Court would decide the issue differently. He merely urges this court to impose a different legal standard upon our forum state based on what he believes are policy imperatives. Federal courts sitting in diversity are in a particularly poor position to endorse a fundamental policy innovations. Absent some authoritative signal from the legislature or the courts of the forum state, there is no basis even for considering the pros and cons of innovative theories. Combs v. International Ins. Co., 354 F.3d 568 (6th Cir. 2004). Plaintiff had the option of filing this action in a Michigan court. If his purpose was to redefine and develop the state common law, he should have done so. This court is bound to apply state law as it currently exists, and the adoption of innovative theories of recovery is inappropriate in the exercise of diversity jurisdiction. Solomon v. Walgreen Co., 975 F.2d 1086, 1089 (5th Cir. 1992).

I conclude that Count III of the First Amended Complaint fails to state a claim upon which relief may be granted, and I recommend that Count III be dismissed.

G. Count IV

Count IV of the First Amended Complaint alleges that Defendant Carl Weiner tortiously interfered with Plaintiff's advantageous relationship with BJOG. Plaintiff alleges that BJOG's adoption of the Uniform Requirements for Manuscripts submitted to Biomedical Journals ("Uniform Requirements"),

created a "reasonable expectancy" in all who have contributed to research published in a biomedical journal that they would be properly acknowledged. The Complaint further alleges that the adoption of the uniform standards created an "advantageous relationship" between Plaintiff and BJOG. (First Amended Complaint, Paragraphs 148-151). Under Plaintiff's theory, Defendant Weiner made false statements to BJOG's editor (Thornton) with the intent of undermining Plaintiff's status as a contributor to the research which was the subject of Buhimschi's article. It is alleged that Weiner knew his representations to be false, or that he recklessly disregarded the truth or falsity of his statements. Count IV asserts that Weiner convinced Thornton of the truth of his statements, and thus "tortiously interfered with the Plaintiff's advantageous relationship and reasonable expectancy." (First Amended Complaint, Paragraph 154). Plaintiff claims that Weiner's tortious interference "was a proximate cause of harm to the Plaintiff's reputation and caused him aggravation, humiliation, and embarrassment." (First Amended Complaint, Paragraph 155).

To state a case under Count IV, Plaintiff must establish the following: 1) the existence or expectancy of a valid business relationship between Plaintiff and BJOG; 2) that Defendant Weiner knew of the relationship; and 3) that Weiner's action induced a breach or termination of the expectancy, which caused damage to Plaintiff. Bonelli v. Volkswagon of America, Inc., 106 Mich.App. 483 (1988).

Defendant Weiner argues that Plaintiff's allegations fail to state a claim for tortious interference with a business expectancy. Weiner

maintains that Count IV is defective in several particulars. First, Plaintiff does not allege that he personally had a contract or the prospect of doing any business with BJOG. Second, Plaintiff fails "to allege how he was damaged by the publication of the article without his name." (Weiner Brief, Page 6). Weiner further argues that Plaintiff must allege specific facts to prove an improper motive for the claimed interference in order to establish that Weiner's actions were unjustified.

In response, Plaintiff maintains that Count IV satisfies all the elements required for a compensable claim of tortious interference with an advantageous relationship. With respect to the specific shortcomings raised by Weiner's motion, Plaintiff states that he "has alleged that he had an expectation of entering into an advantageous relationship with BJOG . . .." (Plaintiff's Brief, Page 11). He further asserts that Weiner was aware of the expectancy, that he intentionally interfered with it by making false statements to BJOG, and that the Defendant's conduct "was the proximate cause of harm to the Plaintiff." Id. Plaintiff rejects any suggestion that his expectancy must relate to a transaction that involves the exchange of money. He claims to be in the business of medical research, and maintains that his job performance is evaluated on the basis of his research productivity. Thus, he claims that "[t]o interfere using improper means . . . with the ability of an academic to publish research is to interfere with an advantageous business relationship." Id. Furthermore, he argues that he will be required to explain to his employer (PRB) "why the PRB published no articles on Proteomics in premature labor . . .." He cites Joba Construction Co. v. Burns and Roe, Inc., 121 Mich.App. 615 (1982) for the proposition

that the recovery of exemplary damages is appropriate. (Plaintiff's Brief, Page 12).

I find that Defendant Weiner has the better argument. The First Amended Complaint plainly relies upon BJOG's adoption of the Uniform Requirements as the basis of the "reasonable expectancy" and "advantageous relationship with BJOG" with which Weiner is alleged to have interfered. Just as the voluntary adoption of private standards of conduct creates no legal duty, I am satisfied that it creates, in itself, no legally cognizable expectancy of recognition or advantageous business relationship. In Schipani v. Ford Motor Co., 102 Mich.App. 606 (1981), a case cited in the opinion relied upon by Plaintiff, the Michigan Court of Appeals held that a plaintiff "must assert a specific and reasonable prospective economic advantage that was interfered with" in order to survive a summary judgment motion. Schipani, in turn, relied upon Behrend v. Bell Telephone Co., 363 A.2d 1152 (1986) for the proposition that:

> [T]he tort of intentional interference with business requires, as a basis, that a business relationship be proved with some degree of specificity, at least to the point that future profit be a realistic expectation and not merely wishful thinking. It is true that where a prospective advantage is alleged, the plaintiff need not demonstrate a guaranteed relationship because 'anything that is prospective in nature is necessarily uncertain. We are not here dealing with certainties, but with reasonable likelihood or probability. This must be something more than a mere hope or the innate optimism of the salesman.'

Behrend, 363 A.2d at 1160. There is no allegation in Plaintiff's First Amended Complaint that he had any business relationship whatsoever with BJOG beyond the hope of benefit accruing from the latter's adherence to the uniform standards. To my mind, that is nothing "more than the mere hope or the innate optimism" to which the Behrend opinion referred. Without support for a legitimate inference of "a specific and reasonable prospective economic advantage that was interfered with," Count IV simply fails to state a claim upon which relief may be granted. I agree with the Defendant that "[i]n the absence of a valid business relationship with a specified third party and a reasonable expectation of a future profit from such relationship, Romero has not stated a claim for tortious interference with advantageous relationships . . .." I recommend that Count IV of the First Amended Complaint be dismissed.

H. Count V

Count V of the First Amended Complaint charges Defendants Buhimschi and Yale with defamation. Plaintiff attributes 34 separate and allegedly defamatory statements to Buhimschi. (First Amended Complaint, Paragraph 59). He claims that Buhimschi published those false statements to WSU on January 20, 2005. (First Amended Complaint, Paragraph 160). Plaintiff further alleges that Buhimschi republished these false statements to the BJOG on March 14, 2005, and that she was acting within the scope of her employment and furthering the interests of her employer, Yale, when she did so. (First Amended Complaint, Paragraphs 161-62). Furthermore, Plaintiff alleges "on information and belief," that Buhimschi republished the statements to Yale (First Amended

Complaint, Paragraph 167), although the date and place of such republications is unspecified. It is further alleged that Yale "ratified" the statements. (Id.).

Defendants Buhimschi and Yale University maintain that Plaintiff's action for defamation based upon Buhimschi's January 20, 2005 letter to Wayne State University, as well as her alleged publication of false statements prior to that date, is barred by the one year statute of limitation imposed by MCLA 600.5805(8). Defendants further allege that the balance of Plaintiff's claims in Count V fail to meet the requirement of Michigan law that a plaintiff plead defamation with specificity. The Defendants further maintain that Plaintiff is a "limited purpose public figure" under the law relating to defamation, and that he was thus required to allege facts which would support an inference of actual malice.

In response, Plaintiff concedes that Michigan's statute of limitations on defamation claims is one year. He argues, however, that Buhimschi's alleged publication of defamatory statements about him to the BJOG on March 14, 2005 created a "new cause of action on which the statute of limitations starts to run afresh." (Plaintiff's Response Brief, Page 5). Plaintiff further argues that he pleaded his defamation claim with sufficient specificity. Finally, Plaintiff maintains that he is not a limited purpose public figure, and thus he needs only to prove negligence to make out a case for defamation. MCLS 600.2911 (2006).

Under Michigan law, the elements of a defamation claim are: (1) a false and defamatory statement concerning the Plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to

at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm (defamation *per se*) or the existence of special harm caused by the publication. Rouch v. Enquirer and News of Battle Creek, (after remand), 440 Mich. 238, 251 (1992).

M.C.L. Section 600.5805(1), (9) provides as follows:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (9) The period of limitations is one year for an action charging libel or slander.

M.C.L. Section 600.5805(1) and (9).

Based upon the foregoing statutory provisions, it is clear that Plaintiff's defamation claims against Buhimschi based upon her allegedly defamatory statements about Plaintiff to Wayne State University on January 20, 2005 (First Amended Complaint, Paragraph 160), and her publication of "some of these false statements" prior to January 2005 to *The Lancet* and officials at the NIH and WSU (First Amended Complaint, Paragraph 166) are barred. Plaintiff does not appear to contest this conclusion in his Response Briefs to the Motions by Buhimschi and Yale University. The only claims in Count V remaining for discussion concern Buhimschi's alleged republication

of the same statements to the BJOG on March 14, 2005; her alleged (but undated) republication to the editorial board of BJOG and/or members of the Royal College of Obstetricians and Gynaecologists, which publication is alleged to be continuing; and Buhimschi's alleged (but again undated) republication of "these statements" to Yale, and Yale's alleged ratification of them.

All of the alleged defamation remaining for analysis occurred after Defendant Buhimschi moved to Yale, in or about July 2003. (First Amended Complaint, Paragraph 87). It is undisputed that Buhimschi was a member of the Yale faculty at the time of her alleged republication of the statements earlier issued by her in her appeal of the Wayne State University academic misconduct proceedings. She remained an agent of Yale when the disputed article was ultimately published in the BJOG. Defendant Yale emphasized that fact in its press release following the publication of the article. The First Amended Complaint asserts that Plaintiff made Yale aware of his dispute with Buhimschi over the article, and asserts "on information and belief" that Buhimschi and Yale discussed that subject matter. Plaintiff has asserted that Buhimschi's alleged publication of defamatory statements about him in connection with her submission of the article to the BJOG was within the scope of her employment by Yale, such that the latter is liable for those acts of defamation on theories of ratification and/or respondeat superior.

Yale cites several Michigan court cases standing for the proposition that a plaintiff must plead defamation with specificity. See, e.g., Royal Palace Homes v. Channel 7, 197 Mich.App. 48, 52 (1992); Gonyea v.

Motor Parts Fed'l Credit Union, 192 Mich.App. 74, 77 (1991).[2] Our circuit has held, however, that a technical rule of pleading defamation at common law have been abrogated by the Federal Rules of Civil Procedure.

> Under the Federal Rules, the pleader need only provide "a short and plain statement of the claim showing the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S.Ct. 1160 (1993) (emphasizing the liberal notice requirements of the Federal Rules). Plaintiff's Complaint specifically referred to the December 1991 broadcast and to the subject matter of that broadcast. This certainly gave notice to the court and to the parties of the nature of the action and the relief sought. Thus Plaintiff adequately pled its defamation claim.

Suarez v. CBS, Inc., 23 F.3d 408 (6th Cir. 1994) (Table case). In the case at bar, Plaintiff has set out in substantial detail the allegedly defamatory statements issued by Buhimschi to Wayne State, and republished by her to the BJOG on March 14, 2005 (and to Yale under unspecified circumstances). Yale argues that Plaintiff failed to indicate which of the statements originally directed to Wayne State were republished to the BJOG. The language of the Complaint, however, can be fairly read to allege that all of the statements were repeated. Yale further argues that not all of the

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[2] Defendants Yale and Buhimschi each filed a Motion to Dismiss. As to Count V, Buhimschi adopts the arguments offered by Yale in its Motion.

statements listed in the First Amended Complaint are defamatory, and I agree. Some of them, however, may be reasonably interpreted as such, and if any would support a claim of defamation, dismissal of the entire count is inappropriate.

Finally, Yale argues that Plaintiff is a limited public figure, and is required to plead "actual malice." Plaintiff denies that he is a limited public figure, but maintains that the facts pleaded in the First Amended Complaint are sufficient to meet such a heightened pleading requirement. The First Amended Complaint plainly alleges that Buhimschi "knew that her factual defamatory allegations . . . were false when she made and published them," and that she "acted throughout with actual (common law) malice, with the specific intent of damaging Plaintiff's professional reputation and standing within his profession and the scientific community." (First Amended Complaint, Paragraphs 163, 164).

In assessing a Motion to Dismiss, the Court "must construe the Complaint in the light most favorable to the Plaintiff, accept all factual allegations as true, and determine whether the Plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." Allard v. Weitzman, (in Re: DeLorean Motor Co.), 991 F.2d 1236, 1239-40 (6th Cir. 1993) (citing Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir.), cert. denied, 498 U.S. 867 (1990)). "A Complaint need not set down in detail all the particulars of a plaintiff's claim, but must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Lillard v. Shelby County Board of Education, 76 F.3d 716, 726 (6th Cir. 1996). It may well be that Plaintiff will be

unable to present sufficient evidence to establish each essential element of his claims in Count V. Should that be the case, Defendant may seek dismissal by way of a Motion for Summary Judgment. Fed.R.Civ.P. 56. At this point, I am unable to conclude that Plaintiff can prove no set of facts which might entitle him to relief. Accordingly, I recommend that the Motions of Defendants Yale and Buhimschi to Dismiss Count V of the First Amended Complaint be granted as to all statements (and republications) occurring more than one year before this action was filed, and denied as to statements or republications occurring on or after January 28, 2005.

I. Count VI

Count VI of the First Amended Complaint asserts a claim of defamation against Defendant Carl Weiner. The Plaintiff alleges that Weiner made factually false and defamatory statements about him in an e-mail to Thornton (Editor of BJOG) on October 10, 2003. Count VI further alleges that Thornton republished Weiner's defamatory statements to agents of Wayne State University in or about March 2005, and to members of the BJOG editorial board in or about November 2005. Plaintiff maintains that those republications were the natural and probable consequences of Weiner's original defamatory statements.

As stated in previous sections of this Report, a federal court sitting in diversity must apply the substantive law of the forum state. Under Michigan law, the elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part

of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication. Rouch v. Enquirer and News of Battle Creek, (after remand), 440 Mich. 238, 251 (1992).

M.C.L. Section 600.5805(1), (9) provides as follows:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (9) The period of limitations is one year for an action charging libel or slander.

M.C.L. Section 600.5805(1) and (9).

Plaintiff asserted the identical claim against Defendant Weiner in the original Complaint in this action. That pleading was filed on February 27, 2006, more than two years after Weiner's alleged e-mail publication of defamatory statements about the Plaintiff to Thornton. (Docket Entry No. 1; Docket Entry No. 31, Paragraph 170). Absent some basis upon which to avoid the operation of the limitations period, Plaintiff's claim against Weiner for his e-mail statements of October 10, 2003 is barred. No basis upon which to toll the operation of the statute of limitations is apparent from the face of the Complaint, or from Plaintiff's Brief in Response to Weiner's Motion to Dismiss.

The balance of Plaintiff's claim against Weiner in Count VI is founded upon the alleged "republication" of Weiner's statements by Thornton, as described in Paragraphs 173-175 of the First Amended Complaint. Plaintiff asserts that the alleged republications "were the natural and probable consequence of the original publication," and apparently maintains that the statute of limitations as to Weiner can be extended or re-started under circumstances in which he could have anticipated the repetition of his remarks. The law of Michigan, however, appears to be to the contrary.

In Mitan v. Campbell, 474 Mich. 21 (2005), the Supreme Court of Michigan held that:

> The plain language of M.C.L. Section 600.5805 is inconsistent with plaintiff's claim that a third party's expected republication of a defamatory statement effects the running of the limitations period for the initial statement. The statute provides a relatively short limitations period of one year; there is nothing in the statute suggesting that the period can effectively be lengthened where republication is anticipated. Rather than a rule of first accrual, the reasoning of the Court of Appeals changes the statute to a rule of last accrual. Such reasoning undermines the principles of finality and certainty behind a statute of limitations.

474 Mich. at 25. In Mitan, the Court of Appeals had relied upon Tumbarella v. Kroger Co., 85 Mich.App. 482 (1978) for the proposition that one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original

publication. The Mitan decision neither accepted nor rejected the general proposition, but did observe that: "even if we were to accept the natural and probable consequences rule, no case from our jurisdiction has held that the rule extends the one year period of limitations." 474 Mich. 21, 25 (2005). Because the only defamatory publication alleged to have been made by Weiner occurred more than one year prior to the filing of this action, and because the republication of his remarks by third parties, even if anticipated by Weiner, does not extend the statute of limitations as to him, Count VI of the First Amended Complaint should be dismissed.

J. Count VII

Count VII of the First Amended Complaint purports to state a claim against RCOG based upon its issuance of a Statement of Disputed Authorship concerning the Buhimschi article in its April 2006 issue of the BJOG. The Plaintiff alleges that the statement contained "express or implied false representations" relating to the Buhimschi article and her scientific misconduct proceedings at WSU. He claims that the "said omissions" were intentional, and calculated to mislead the scientific community in order to conceal and minimize the BJOG's intentional wrongdoing. (First Amended Complaint, Paragraph 181).

Defendant RCOG challenges Count VII as patently unintelligible and baseless. The Defendant maintains that Plaintiff has failed to plead the elements of any known claim, and argues that Plaintiff can point to no authority showing that it had any duty to him which would support a cause of action. In response, Plaintiff

argues that the code of conduct for editors of biomedical journals "expressly imposes on editors to take action whenever they suspect misconduct." Plaintiff recognizes that this standard was voluntarily undertaken by members of scientific journalism organizations. In this case, he maintains that RCOG's membership in the World Association of Medical Editors ("WAME") and the Committee on Publication Ethics ("COPE") imposed a duty upon BJOG to withhold publication of an article whose authorship it knows is disputed until it has satisfied itself that the authorship is correct. Plaintiff argues in his brief that the duty was personal between BJOG and himself, and that every biomedical journal owes both the scientific committee and scientists a similar obligation.

To the extent that Plaintiff relies upon a duty imposed upon BJOG by its voluntary adoption of publication standards established by journalistic organizations to which it belongs, I find that Count VII of the First Amended Complaint fails to state a cause of action upon which relief may be granted. My reasoning is the same as that expressed in connection with Count III. Under Michigan law, the existence of a legal duty is a question of law. Beaudrie v. Henderson, 465 Mich. 124 (2001). In Adkins v. Mong, 168 Mich.App. 726, 730 (1988), the Michigan Court of Appeals determined that non-legal authorities, such as standards of practice adopted by professional organizations, and subscribed to by their members, do not confer a legal duty. Plaintiff has cited no Michigan statute or case to the contrary. This court is not free to disregard the reported case of an intermediate state court unless it is persuaded that the Michigan Supreme Court would reject the holding. Again, Plaintiff has offered nothing to suggest that the

decision in Adkins v. Mong, now nearly thirty years old, would be rejected by the Supreme Court of Michigan. Plaintiff's First Amended Complaint simply fails to allege facts under which this court could conclude that the conduct of BJOG in connection with the statement of disputed authorship violated any legal duty to Plaintiff. Accordingly, I recommend that Count VII of the First Amended Complaint be dismissed.

K. Conclusion

For all of the above reasons, I recommend that Defendant Buhimschi's Motion to Dismiss be granted as to Count I, denied as to Count II and granted in part as to Count V.

I recommend that Defendant Yale University's Motion to Dismiss be granted as to Count I and granted in part as to Count V.

I recommend that Defendant Weiner's Motion to Dismiss be granted as to Counts I, IV and VI.

I recommend that Defendant Royal College of Obstetrics and Gynecology's Motion to Dismiss be granted as to Counts I, III and VII.[3]

---

[3] RCOG filed a second Motion to Dismiss under Fed R.Civ.P 12(b)(2). Should the Court accept my recommendation for dismissal of all claims against RCOG for failure to state a claim, the second motion should be denied as moot

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. Section 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985), Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1991). Filing of objections that raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall not be more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

s/Donald A. Scheer
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: May 22, 2007

[Certificate of Service omitted]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-1195

[Filed October 26, 2010]

ROBERTO ROMERO, M.D.,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
IRINA BUHIMSCHI, M.D., ET AL.,	)
	)
Defendants-Appellees,	)
	)
CARL WEINER, M.D., ET AL.,	)
	)
Defendants.	)
	)

ORDER

BEFORE: NORRIS, MOORE, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX G

15 U.S.C. § 1125. False designations of origin, false descriptions, and dilution forbidden

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or devise, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or cause mistake, or to deceive as to affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

U.S. Const., amend. V

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const., amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

APPENDIX H

Report of the Investigative Committee Regarding an Allegation of Misconduct in Research Against Prof. Irina A. Buhimschi, Department of Obstetrics and Gynecology, Wayne State University

Date: May 20, 2004

BY: Chris-Ellyn Johanson, Ph.D., Chair, Professor, Department of Psychiatry and Behavioral Neurosciences, School of Medicine, Wayne State University

Dorothy Nelson, Ph.D., Professor, Department of Internal Medicine, School of Medicine, Wayne State University

David Wright, Ph.D., University Intellectual Integrity Officer, Michigan State University

Members, Investigative Committee

E. Ray Stinson, Ph.D., Assistant Vice President for Research (AVPR), Wayne State University, ex officio

* * *

The IC convened on 26 January 2004 at 10:00 a.m. at 540 E. Canfield, WSU, Room 1328, Detroit, Michigan. Prior to taking testimony from witnesses, AVPR Stinson discussed the WSU Policy and

Procedures Regarding Scientific Misconduct and the actions he had taken in conducting the Inquiry and preparing for the Investigation. AVP Stinson informed the IC that on January 23, 2004 I. Buhimschi had notified J. Oliver that she declined to participate in the hearing and further that she declined to cooperate in the university's review of the allegation (Enclosure J). AVPR Stinson recounted his many invitations to her to participate and means of informing her of progress with appropriate documentation (Appendix E pp. 126-130). The IC also met with University Counsel, Mr. Scott Fitzgerald. * * *

* * *

The IC reviewed communications from I. Buhimschi and other coauthors (Rob Christner, Ph.D. and Catalin Buhimschi, M.D.) who had declined to testify. I. Buhimschi, R. Christner and C. Buhimschi also declined to cooperate and did not provide any requested information or documents. However, I. Buhimschi directly sent the IC several documents (Enclosures K, L, M, N, and O) that served the purpose of defending herself while impugning the motives and integrity of the removed coauthors, especially R. Romero and administrators at WSU, especially AVPR Stinson. In these communications, she alleged that the WSU Investigation was motivated by its desire to retain the NIH Branch on the WSU campus. In the interest of fairness the IC considered these assertions from I. Buhimschi while noting that she did not at the same time make herself available to answer questions from the IC about any evidence that she might have supporting her allegations against others as described in the documents she had submitted (Enclosures K, L, M, N, and O). The IC interviewed AVPR Stinson at

length about I. Buhimschi's allegation that WSU had an institutional conflict of interest. AVPR Stinson explained that I. Buhimschi's attorney, Mr. Keith, had made unspecified allegations of institutional conflicts of interest on the part of WSU. WSU counsel wrote Mr. Keith asking for specifics. AVPR Stinson told the IC that Mr. Keith had not responded (Appendix E, frames 130-133). The IC then asked AVPR Stinson about I. Buhimschi's assertions concerning him, specifically that he was a personal friend of R. Sokol and of R. Romero, and that R. Sokol had helped to recruit AVPR Stinson to WSU. AVPR Stinson denied these allegations on the record (Enclosure E, frames 134-137). The IC also reviewed with AVPR Stinson I. Buhimschi's right to challenge members of the IC for asserted conflicts of interest (Policy and Procedures Regarding Scientific Misconduct, Section 6.4) and that she did not challenge any of the members (Appendix E, frame 138).

* * *

19. * * * She also told Dr. Young that she was endeavoring to reach an amicable settlement of the authorship dispute. The IC can find no evidence of such efforts.

* * *

An independent expert review by Paul Stemmer, Ph.D., Associate Professor, Institute of Environmental Health Sciences, corroborates the IC's comparison and evaluation of the two manuscripts and their contributors. * * *

* * *

In summary, it appears to the IC and to Dr. Stemmer that the major elements of study design and data characteristics are the same in both versions, and that one or more of the original authors' contributions remain in the final version. It is not possible to determine which authors might be retained or removed from the final version, with the exception of Dr. Romero whose involvement is clear in both versions.

* * *

Second, there are a number of inconsistencies and contradictions in I. Buhimschi's explanations and justifications for submitting the second manuscript without four of the original authors. The IC finds in I. Buhimschi's conduct a pattern of deception, uncooperativeness and deliberate obfuscation when dealing with R. Romero, editor Young, WSU officials, including AVPR Stinson and the IC. This pattern suggests to the IC a deliberate attempt by I. Buhimschi to hide her use of her former collaborators' work without giving them appropriate credit as authors. * * *

* * *

The IC concludes from the evidence cited that misconduct for charges #1 and #3 occurred and were due to the actions of I. Buhimschi. These deviations from normal scientific process are serious and have damaged the scientific careers of the deleted authors. The IC recommends that for a two year period I. Buhimschi's submissions of manuscript to journals and abstracts for presentation be monitored to determine whether appropriate attributions of contributions of

other investigators have been acknowledged by authorship and appropriate channels of communication with colleagues occur.

APPENDIX I

YALE UNIVERSITY
SCHOOL OF MEDICINE

DEPARTMENT OF OBSTETRICS, GYNECOLOGY
AND REPRODUCTIVE SCIENCES

Office of the Chairman *Tel: 203-737-2970*
Fax: 203-785-4713

MEMORANDUM

CONFIDENTIAL

TO: Lawrence S. Cohen, M.D.
Special Advisor to the Dean

FROM: Charles J. Lockwood, M.D.
Professor and Chair of Ob / Gyn /s/ CJL

RE: Allegations of potential scientific misconduct by a new faculty member

DATE: September 24, 2003

Many thanks for meeting with Fred Naftolin who apprised you of a recent authorship dispute between one my new faculty, Irina Buhimschi, MD, Associate Research Scientist, and Dr. Roberto Romero, Director of the NICHD's Perinatal Research Branch located at Wayne State University in Detroit. I would like to

summarize my knowledge of the events in question, and ask for your opinion on what steps, if any, the School or my department should take at this point.

Here is a rough chronology of the events surrounding the dispute of which I am aware:

• At the prompting of Drs. Joshua Copel and Errol Norwitz, beginning in February 2003, I was encouraged to consider recruiting Dr. Irina Buhimschi to my research faculty and to offer her husband, Dr. Catalin Buhimschi, an opportunity to complete his MFM Fellowship at Yale. Both were at Wayne State, with Irina working independently of, but in collaboration with, Dr. Roberto Romero. I understood that Dr. Catalin Buhimschi had become embroiled in a personal dispute with the Director of the Division of Maternal-Fetal Medicine at Wayne State, and as a result they were both interested in relocating. I immediately phoned Roberto to seek his appraisal of Irina as well as his permission to proceed with evaluating her for a faculty position. Roberto provided a positive evaluation and confirmed that interpersonal conflicts between her husband, Catalin, and the Director of the Division of Maternal-Fetal Medicine at Hutzel Hospital were the reasons for their interest in leaving Detroit. He affirmed that both were competent as researchers but stated he had not observed Dr. Catalin Buhimschi's clinical activities and thus could not provide an opinion as to his clinical skills.* * *

* * *

• In late July, after their arrival, I was informed by Irina of her highly unusual response to peer reviewers'

comments on a manuscript submitted to The Lancet on which she was the first and corresponding author. The recommendation of the Lancet editorial board was that Dr. Buhimschi conduct a major revision, which included removing a section of the manuscript contributed by Dr Roberto Romero, an NIH employee. According to Dr. Buhimschi, contemporaneously, Dr. Romero had asked that another NIH employee be added to the list of authors even though he had made no contribution. Whether in anger at this suggestion, out of pique due to perceived slights to her husband by the Wayne State staff, or out of genuine ignorance of the rules of authorship, Dr. Irina Buhimschi decided to submit the revised manuscript to the Lancet without Dr. Romero's name on it. When informed of this by Irina, after the fact, I stated that, in my opinion, this was inappropriate. Following this meeting, Dr. Buhimschi, apparently seeking a different opinion, approached Dr. Naftolin for advice. This is how Dr. Naftolin became involved in the issue. Incidentally, Fred agreed with my assertion.

* * *

• Dr. Naftolin pursued the issue, aggressively. He met with the Buhimschis, and then met with Dr. Romero in Washington, DC in late August. * * * At my request, Dr. Naftolin next informed you of his various findings and the complexities of the case.

* * *

At this point I do not believe the Yale University School of Medicine needs to involve itself in this matter but will inform you of any new developments.

However, please advise me if you believe any actions need to be taken by me. Many thanks for your counsel.

APPENDIX J

STATE OF MICHIGAN

WAYNE COUNTY

AFFIDAVIT OF MR. HARVEY SHIFRIN

1.

My name is Harvey Shifrin. I am over 18 years of age, and I am competent to prepare this affidavit. I have first hand knowledge of the matters to which I am attesting to in this affidavit.

2.

I was the Contracting Officer of the National Institute of Child Health and Human Development (NICHD), and involved in the preparation and issuance of Request for Proposals for a Service Contract in support of the Perinatology Research Branch (PRB) of NICHD. I was also involved in evaluating proposals submitted by offerors, and ultimately in the award of the contract to Wayne State University ("WSU").

3.

Two offerors were in the competitive range, WSU and Yale University (Yale), and both institutions submitted "Best and Final Offers. I conducted site visits at both institutions with Dr. Roberto Romero.

Before its Best and Final Offer was submitted, I sent a letter to Ms. Verna Lingis requesting that Yale address additional issues, as outlined in the attachment to my letter, a true and copy of which is attached hereto as **Exhibit 1**.

4.

Questions, framed as Case Studies that described hypothetical situations, were presented to Yale to evaluate the scientific culture of the institution. These questions were presented because the problems outlined in the Case Studies had been encountered when the NICHD first established the PRB and entered into a contract with Georgetown University. NICHD terminated this contract at the convenience of the government. One of the situations Yale was specifically asked to address was what it would do if one of its employees were to publish a study that was conceived by the PRB and conducted at least partly with resourced belonging to the PRB. **Exhibit 2**, Case Study No. 2. An excerpt of Yale's best and final offer, which I received on April 5, 2002, containing Yale's answer to Case Study No. 2 is attached to this affidavit as **Exhibit 3**.

5.

The situation outlined in Case Study No. 2 materialized after the contract was awarded to WSU when Dr. Irina Buhimschi, an employee of WSU, removed the names of Dr. Roberto Romero and other PRB members from a manuscript describing research she had conducted with the PRB, using experimental materials collected pursuant to IRB-approved protocols written by members of the PRB. Dr. Romero asked me

if the matter should be referred to the Ombudsman at the National Institutes of Health (NIH). I advised Dr. Romero not to involve the Ombudsman because he had no authority to resolve the problem, and because Dr. Buhimschi was a WSU employee and faculty member, and the matter should be resolved according to the policies and procedures of WSU, as described in WSU's response to the Case Studies (**Exhibit 4**) it was required to answer in its best and final offer.

FURTHER AFFIANT SAYETH NOT.

/s/ Harvey Shifrin

MR. HARVEY SHIFRIN

Signed before me on this
17 day of July, 2008.

Notary Public. /s/ Heather A. Millar

HEATHER A. MILLAR
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Sep 22, 2012
ACTING IN COUNT OF WAYNE

[SEAL]

Best and Final Offer

From
Wayne State University

For
RFP NICHD-2001-01

Services in Support of the Perinatology Research Branch, Division of Intramural Research, NICHD

* * *

Case 2: * * *

(1) pertinent institutional policy

* * * This could be a case of misappropriation of data, plagiarism or a serious deviation from commonly accepted practices under the WSU Scientific Misconduct Policy. It would warrant an inquiry for scientific misconduct from the information provided. * * *

(2) whether the situation has occurred in the past

Variations of this case have occurred at WSU. * * *

(3) remedies should this arise during the course of contract administration

* * * WSU would institute an inquiry for scientific misconduct in this case and follow our procedures that

may result in remedies for proper attribution (see Case 1) and disciplinary action for the employee.

* * *

APPENDIX K

From: Buhimschi, Irina

Sent: Thursday, October 10, 2002 3:01 PM

Subject: RE: our conversation of Tuesday

Dear Dr. Romero,
Thank you for your note. I fully agree that the publication of this paper is now the priority at not to seek intelectual property rights.
As I have mentioned to you on Tuesday I was drafting a narrative of the events the experiments in concordance with Rob's and my lab notes. It is basically summarized well by your outline. I would like to show it to you before I finalize it. The intension of the narrative is to explain how the SELDI project evolved in the context of the other projects we were collaborating on and it would be just for our files or, in the case any of the institutions will decide over our recommendation to seek intelectual property rights it may be handy to already have the chronology and unobviousness statement drafted.

* * *

Irina

* * *

APPENDIX L

Dr. Irina Buhimschi
Assistant Professor
Department of Obstetrics & Gynecology
Wayne State University/C.S. Mott Center
275 E. Hancock, Detroit MI 48201

October 16, 2002

To Whom It May Concern:

* * *

My husband, Catalin and I decided to come to Detroit after meeting with the faculty members at Wayne State and with Dr. Romero and I received the letter of intent on March 13, 2001. * * *

* * *

In March 10-15 I attended a course on Proteomics in Geneva, Switzerland where I had close interactions with the leading group in the field and technologies for protein identification and database searching. I became familiar with the various data analysis approaches and when I came back from Switzerland I had a clear picture of how the SELDI data should be analyzed. After my return from Switzerland I attended the SGI meeting and upon my return I discussed with Dr. Romero the importance of our prior observations with the SELDI platform and that there are marked difference in profiles in amniotic fluids from patients

with intraamniotic infection and inflammation. I conveyed to him we are now in the position to quantify these differences so that we generate a meaningful diagnostic profile. Dr. Romero showed me a correspondence describing terms of collaboration with Dr. Lance Liotta and subsequently provided me with the samples necessary for a complete study.

* * * I performed the experiments with the 90 samples of amniotic fluid between 04-11-02 and 04-23-02 and subsequently started the data analysis. * * * The MR score was computed on 05-12-02. I conveyed to Dr. Romero that the result of the analysis has the shape of a diagnostic score. We discussed the outliers and the limitations of the "gold standards": amniotic fluid cultures and white blood count.

Identification of the 4 biomarkers was the next step and Dr. Christner and I began tryptic digests May 20, 2002. Antibody captures for calgranulin peaks were performed on 6-10-02 and for defensins on 06-19-02.

Dr. Romero suggested testing blindly a set of samples and formulated criteria for sample selection so that the samples were either clearly "diseased" or "non-diseased". Sam received the samples, diluted and forwarded them to me in colored tubes. I read the chips with the blinded samples on 05-26-02 in Ann Arbor on Dr. Christner's instrument and Catalin and I scored blindly the samples and forwarded the MR results via e-mail to Dr. Chaiworapongsa.

I began drafting the manuscript the next day and on 07-06-02 forwarded to Dr. Romero the first draft of a manuscript formatted for Nature. On 09-02-02 I

forwarded a final draft of the manuscript formatted for The Lancet to all co-authors.

Irina Buhimschi, MD

APPENDIX M

[LOGO]

DEPARTMENT OF HEALTH & HUMAN SERVICES

* * *

* * *

May 22,2001

Lance Liotta, M.D., Ph.D.
Chief, Laboratory of Pathology
National Cancer Institute, Division of Clinical Sciences
National Institutes of Health
10 Center Drive, Bldg. 10, B1B41
Bethesda, MD 20892-1500
Fax: 301-480-0853

Dear Dr. Liotta:

This is to follow up on our conversation of last Monday after your talk at the meeting of Extracellular Matrix in Reproduction.

* * *

* * * You suggested that I write to you to plan a meeting between our groups to explore the possibilities of collaboration and the specific steps to be taken.

I travel to NIH every month and plan to be there in June to meet with the Director and Scientific Director of NICHD. The application of functional genomics and proteomics is a high priority for the Perinatology Research Branch and NICHD and I hope that we will be able to collaborate on these studies. My telephone number is 313-993-2700, fax number is 313-993-2694 and my e-mail address is warfiela@mail.nih.gov.

With warm personal regards,

/s/
Roberto Romero, M.D.
Chief, Perinatology Research Branch
Intramural Division, NICHD

* * *

APPENDIX N

Volume 87, Number 6 SMFM Abstracts S55
Am. J. Obstet Gynecol

* * *

PROTEOMIC ANALYSIS OF PRETERM PARTURITION: A NOVEL METHOD OF IDENTIFYING THE PATIENT AT RISK OF IMPENDING PRETERM DELIVERY. IRINA BUHIMSCHI[1], ROB CHRISTNER[2], CATALIN BUHIMSCHI[1], TINNAKORN CHAIWORAPONGSA[3], ROBERTO ROMERO[4]. [1]Wayne State University, Obstetrics and Gynecology, Detroit, Michigan [2]Ciphergen Biosystems, Fremont, CA [3]Perinatology Research Branch, NICHD, NIH, Detroit, Michigan [4]Perinatology Research Branch, NICHD, NIH, Detroit, Michigan

OBJECTIVE: A reductionist approach to understanding preterm labor has yielded limited success. Genomics and proteomics have the power to provide the first comprehensive description of the functional and molecular events in preterm parturition. The purpose of the study was to identify patients with preterm labor at risk for preterm delivery by using proteomic tools.

STUDY DESIGN: Proteomic analysis of amniotic fluid (AF) from patients with preterm labor, pPROM and term elective Cesarean was undertaken (n=114). The first differential analysis compared protein profiles of patients with preterm labor who delivered preterm (n=58) and those whose preterm labor

symptoms resolved and delivered at term (n=19). We then compared pPROM (n=29) versus preterm labor with intact membranes (n=28). AF cultures and WBC were used to define infection and inflammation. The proteomic analysis consisted of mass spectrometry (SELDI-TOF and MALDI-MS/MS) complemented by electrophoresis. Bioinformatic analysis was used to define discriminatory patterns.

RESULTS: 1) A profile of 13 biomarkers discriminated patients with preterm labor who delivered at term from those with intra-amniotic infection and inflammation with 100% sensitivity and 100% specificity; 2) The most parsimonius profile consisted of only 4 biomarkers; 3) An abnormal profile was associated with impending preterm delivery (median interval to delivery 1 day vs. normal profile 23 days; $p<0.0001$, 95%CI of ratio 22-24); 4) Analysis could be undertaken in < 30 mins. using only 1-1 of AF; 5) The profiles of patients with infection and inflammation were undistinguishable from each other; 6) The 4 most informative biomarkers were matched in the protein data band SWISS-PROT.

CONCLUSION: Proteomic analysis of AF identifies patients at risk for impending preterm delivery as well as those with intra-amniotic inflammation. This information can be generated rapidly, reliably, inexpensively and in time for clinical decision making.

* * *

APPENDIX O

* * *

Proteomic analysis of amniotic fluid for the rapid identification of intra-amniotic inflammation leading to preterm delivery

Irina A. Buhimschi, MD [1,3]
Rob Christner, PhD [2]
✓Catalin S. Buhimschi, MD [3]
Chenthil Rathnasabapathy, MD [1]
Samuel Edwin, PhD cand. [1]
Tinnakorn Chaiworapongsa, MD [1]
Roberto Romero, MD [1]

[1] Perinatology Research Branch, National Institute of Child Health and Human Development, NIH/DHHS, Bethesda, Maryland 20892;

[2] Ciphergen Biosystems, Fremont, California 94555;

[3] Wayne Slate University, Department of Obstetrics and Gynaecology and The C.S. Mott Center for Foetal Growth and Development, Detroit, Michigan 48201.

Correspondence and requests for materials should be addressed to:
Dr. Irina A. Buhimschi, Department of Obstetrics and Gynaecology, Wayne State University / The C.S. Mott Center, 275 E Hancock Avenue, Detroit, MI 48201,

Telephone: (313) 577-0547, Fax: (313) 577-8554, Email: ibuhimsc@med.wayne.edu

* * *

Signatures:

Irina A. Buhimschi: I designed the study, performed all experimental procedures, data analysis and prepared the manuscript. Rob Christner assisted with optimization and identification of the biomarkers. C S Buhimschi participated in the study design, sample collections, blind testing of the MR score and data analysis. C Rathnasabapathy performed the HNP ELISA assays. S Edwin coded the samples used for blind testing and participated in the ELISA assays. T Chaiworapongsa was involved in the patient and sample selection, and clinical data acquisition. Roberto Romero participated in the design of the study, supervised the clinical assessments, and assisted with the interpretation of data and preparation of the paper.

I declare that I participated in the study by Irina Buhimschi "Proteomic analysis of amniotic fluid for the rapid identification of intra-amniotic inflammation leading to preterm deliver" as described above and I have seen and approved the final version.

/s/	Irina A. Buhimschi, MD
/s/	Rob Christner, PhD
/s/	Catalin Buhimschi, MD
/s/	Chenthil Rathnasabapathy, MD
/s/	Samuel Edwin, PhD cand.

/s/ Tinnakorn Chaiworapongsa, MD

/s/ Roberto Romero, MD

APPENDIX P

19. If you have a clear preference for dealing with any particular patent attorneys, please so indicate.

no preference

****

Please do not submit the disclosure without department/dean signatures as appropriate or without the signatures of all persons named as investigators in item 2. If more than one investigator, please indicate percent of contribution.

SIGNATURES:	DATES:	PERCENT OF CONTRIBUTION:
Irina A. Buhimschi /s/ INVESTIGATOR	10-27-2002	40%
Roberto Romero /s/ INVESTIGATOR	10-27-2002	40%
Rob Christner /s/ INVESTIGATOR	10-27-02	20%

INVESTIGATOR

/s/ 10-30-02
CHAIR (Need if multiple departments)

CHAIR

/s/ 11/01/02
DEAN (Need if multiple departments)

/s/
DEAN

APPENDIX Q

Warfield, Amy

From: **Edwin, Sam**
Sent: **Tuesday, May 14, 2002 8:50 AM**
To: **Amy Warfield (E-mail)**
Subject: **Lab related**

Dear Dr. Romero,

* * *

c. Irina has requested us to run some assays of anti-microbial peptides (Defensins) to confirm her findings in her SELDI work. We have forwarded the purchase requests to John and requested him to get your permission to order these kits. We have received the kits ordered by John in the laboratory. Irina says she has about 90 specimens. We will obtain the specimens from Irina and will organize them to start the assays beginning Wednesday.

* * *

Sincere Regards,
Sam

APPENDIX R

From: Buhimschi, Irina
Sent: Friday, September 27, 2002 3:36PM
To: Warfield, Amy
Subject: RE: SMFM Abstracts

Dear Dr. Romero,
Both Catalin and I would like to thank you as it wouldn't have been possible without you. We know we can do more in the future with your help and support.
Irina

* * *

Dear Irina and Catalin:

You probably know by now that the proteomics paper is in the plenary session at the SMFM.
This is a great achievement and I want to congratulate you on your contributions, hard work and dedication. This presentation has the potential to bring great visibility to both of you and I am delighted that this will happen through our collaboration.

Let me take this opportunity to say how important it is to prepare for all foreseeable questions, such of those that were asked of me at the Branch Chiefs Meeting. Specifically, it is prudent to have data on the comparison with IL-6, MMP-8, as well as the cohorts of patients in premature labor and preterm PROM.
* * *.

Irina and Catalin, I am very happy about this. You have much to be proud of.

With warm personal regards,

Roberto Romero, M.D.
Chief, Perinatology Research Branch
Intramural Division, NICHD

* * *

APPENDIX S

Yale University

OFFICE OF THE SPECIAL ADVISOR TO THE DEAN
SCHOOL OF MEDICINE
333 CEDAR STREET, I-207 SHM
P.O. BOX 208000
NEW HAVEN, CONNECTICUT 06520-8000

LAWRENCE S COHEN, M.D.
THE EBENEZER K HUNT PROFESSOR OF MEDICINE

Telephone: (203) 785-4683
Fax: (203) 737-4463
lawrence.s.cohen@yale.edu

May 4, 2005

CONFIDENTIAL

Margretta R. Seashore, M.D.
Professor of Genetics and Pediatrics
WWW 305

Re: Wayne State University/Irina Buhimschi

Dear Greta:

Thank you for agreeing to participate in the *ad hoc* committee that we have convened to advise Dean

Alpern what actions, if any, the School of Medicine should take with respect to the following matter.

* * *

Dr. Buhimschi's explanation of the events leading to the charge encompasses a broad array of behavior by Dr. Romero, some of which she appears to charge would itself constitute scientific misconduct and that may not have been addressed by the WSU Investigation Committee. She explains that, in essence, with two remaining co-authors (R. Christner and C. Buhimschi), she herself had done the key work on the manuscript; Dr. Romero required her to add himself and three others and their data into the manuscript for his own professional advantage; he pressured her to add another high ranking individual as author, one whom she alleges made no contribution at all to the manuscript; and he delayed her first-author publication in order to gain personal and professional advantage by publishing similar material first. * * *

Dr. Buhimschi further objects that WSU had an institutional conflict of interest that precluded it from fairly judging this dispute and that taints its decision in this matter. She implies that Yale should take this conflict into account in assessing how properly to respond to WSU's demand that Yale act on its findings.

* * *

Sincerely,

/s/ Larry Cohen
Lawrence S. Cohen, M.D.
Special Advisor to the Dean

cc: Robert Alpern, M.D.
Susan L. Carney
Joshua A. Copel, M.D.
Charles Lockwood, M.D.
Carolyn W. Slayman, Ph.D.
Stephanie Spangler, M.D.

APPENDIX T

STATE OF MICHIGAN
WAYNE COUNTY

AFFIDAVIT OF YORAM SOROKIN, M.D.

1.

My name is Yoram Sorokin. I am over 18 years of age, and I am competent to prepare this affidavit. I have first hand knowledge of the matters to which I am attesting to in this affidavit.

2.

I am a board certified obstetrician-gynecologist, and a subspecialist in Maternal-Fetal Medicine, in which I am also board certified. I am Professor of Obstetrics and Gynecology at Wayne State University ("WSU), a title I have held since 1997. I have been Director of the Maternal Fetal Medicine Division at WSU since 1992. I have been Director of the Fellowship Program in Maternal Fetal Medicine since March 2002. I was also Acting Director of the Fellowship Program for two months, August-September, 2001, while Dr. Stanley Berry, the Director of the MFM Fellowship program, was on leave. I am the Principal Investigator of the NICHD supported Maternal-Fetal Medicine Unit (MFMU) Network at Hutzel Women's Hospital, Wayne State University. Therefore, I am an independent Principal Investigator conducting funded research by

the Federal Government through a competitive peer review process.

3.

Dr. Catalin Buhimschi was offered, and accepted, a position as Fellow in Maternal Fetal Medicine at WSU commencing on July 1, 2001. I supported his application and the offer of a MFM Fellowship position to him. However, questions were raised about Dr. Catalin Buhimschi's professional conduct soon after he started the Fellowship in our department.

4.

Dr. Catalin Buhimschi created very significant problems with morale within the Division of Maternal-Fetal Medicine by proposing and attempting to advance research projects that were in competition with very similar research projects in progress by other MFM fellows. The first incident occurred shortly after Dr. Catalin Buhimschi joined our Division and Department. I mediated the conflict because Dr. Stanley Berry was on leave. * * *

* * *

5.

Several months later, a similar conflict arose when Dr. Catalin Buhimschi had a new research protocol which was very similar to a research project of another fellow in the Maternal-Fetal Medicine Division, Dr. Emmanuel Bujold. Dr. Bujold came from the University of Montreal, where he had conducted several research projects, as a resident, on risk factors

for rupture of the uterine scar in women with prior cesarean deliveries. He had published articles on the subject and had presented his work to the Society of Maternal-Fetal Medicine ("SMFM"). Dr. Bujold had active discussions about creating a VBAC model in rats with Dr. Stanley Berry and me. Dr. Catalin Buhimschi then had a new protocol written to study the strength of the uterine scar in small animals. This project overlapped with the research interest of Dr. Bujold. Dr. Catalin Buhimschi did not discuss his project with Dr. Bujold. Dr. Stanley Berry, the Director of the Fellowship at the time, informed Dr. Catalin Buhimschi that he would not approve the conduction of the protocol because it conflicted with the studies previously proposed by Dr. Bujold. These actions created the perception within the fellowship that Dr. Catalin Buhimschi was "stealing" their ideas. Again, I attempted to resolve the conflict and mediate any disputes with several meetings with Dr. Catalin Buhimschi and Dr. Bujold, and Dr. Berry, the Director of the MFM Fellowship program. The problem of mistrust with Dr. Catalin Buhimschi got worse over time.

6.

The next problem arose when Dr. Catalin Buhimschi started to collect extra-amniotic fluid for research in areas on which other members of the department were already working. * * * Attached as **Exhibit 3** to this affidavit is a true and correct copy of a memorandum I received from Dr. Sean Blackwell, dated October 25, 2002, describing the same problem as well as Dr. Catalin Buhimschi's general behavior with respect to the research other fellows and junior

faculty members were conducting within the Department.

7.

In November, 2002, I received concerns from faculty members and fellows that referred to patient care. Attached as **Exhibit 4** to this affidavit is a true and correct copy of a memorandum I received from one of the fellows, Dr. Israel Hendler, who was on call for the labor ward when the first incident occurred, dated November 14, 2002. The attending physician was Dr. Susan Berman. Attached as **Exhibit 5** to this affidavit is a true and correct copy of a memorandum I received from her on November 22, 2002. I discussed this case with Dr. Catalin Buhimschi. Yet, less than two weeks later, another similar incident occurred. Attached as **Exhibit 6** to this affidavit is a true and correct copy of the memorandum I received from Dr. Janice Whitty, dated November 26, 2002, the patient's attending.

8.

Up to the time of these incidents, the problems surrounding Dr. Catalin Buhimschi involved only his professional conduct and ethics related to research. I was still hoping that matters would work themselves out. The two reports I received, however, indicated that Dr. Catalin Buhimschi's research practices were now affecting patient care, and that was totally unacceptable. His conduct in these two cases was entirely consistent with the general perception that Dr. Catalin Buhimschi did not care about patients and was not a good doctor. I discussed the matter with Mr. Sean Fitzgerald in the WSU General Counsel's office, and with Stanton Beatty from DMC Legal. They

indicated that the institutions (Wayne State University and the Detroit Medical Center) could have legal exposure if a patient was harmed because of actions of Dr. Catalin Buhimschi. I was advised that my knowledge of the two previous cases in which there were problems with patient care could create a problem for me and the institutions (WSU and DMC) if I did not take disciplinary action.

9.

I decided that corrective action was required, and informed Dr. Catalin Buhimschi that his contract would not be renewed for a third year. In order to minimize the negative impact on Dr. Catalin Buhimschi's career, I made arrangements with Dr. Robert Sokol, Director of the Mott Center, to permit Dr. Catalin Buhimschi to complete his year in the laboratory. I informed Dr. Catalin Buhimschi of these decisions on December 18, 2002. Dr. Roberto Romero had no involvement whatsoever in these decisions.

10.

I was never contacted by Dr. Joshua Copel or any other faculty member of Yale University to inquire as to the professional experience and performance of Dr. Catalin Buhimschi at Wayne State University and the Detroit Medical Center.

FURTHER AFFIANT SAYETH NOT.

/s/
Yoram Sorokin, M.D.

Signed before me on this
5th day of September, 2008.

Notary Public /s/ Heather A. Millar

HEATHER A. MILLAR
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Sep 22, 2012
ACTING IN COUNT OF WAYNE

APPENDIX U

PROTEOMIC ANALYSIS OF AMNIOTIC FLUID FOR THE IDENTIFICATION OF INTRA-AMNIOTIC INFLAMMATION LEADING TO PRETERM DELIVERY

Irina A. Buhimschi, MD [1]
Rob Christner, PhD [2]
Catalin S. Buhimschi, MD [1]

[1] Wayne State University, Department of Obstetrics and Gynaecology – The C.S. Mott Centre for Fetal Growth and Development, Detroit, Michigan 48201.

and

[2] Ciphergen Biosystems, Fremont, California 94555.

Correspondence and requests for materials should be addressed to:
Dr. Irina A. Buhimschi, Department of Obstetrics and Gynaecology, Wayne State University / The C.S. Mott Center, 275 E Hancock Avenue, Detroit, MI 48201, Telephone: (313) 577-0547, Fax: (313) 577-8554, Email: ibuhimsc@med.wayne.edu

* * *

METHODS

* * *

The study was: conducted in two stages. In the first stage, 77 samples from patients with known outcomes were used to uncover relevant proteomic patterns. The samples used were collected from January 1993 through October 2001 and were stored at-80°C until our analysis in April 2002. * * *

* * *

Conflict of interest statement: Irina Buhimschi is the inventor and Catalin Buhimschi and Rob Christner are co-inventors on a patent application of the discovery and use of biomarkers of intra-amniotic inflammation. Rob Christner works for Ciphergen Biosystems, the manufacturer of the PBS II instrument and of the ProteinChip arrays named in this study.

Acknowledgement: We thank Dr. Jon Nuss from Wright State University for the SELDI compatible peptide elution protocol. Salary support was from the Department of Obstetrics and Gynaecology at Wayne State University (Drs. Irina and Catalin Buhimschi) and Ciphergen Biosystems (Dr. Rob Christner). The NICHD intramural program at Wayne State University provided part of the biological samples and funds for some of the ProteinChip arrays. Ciphergen Biosystems provided free access for Drs. Irina and Catalin Buhimschi to PBS II instrumentation during the study and the Protein Chip arrays used for the identification of the biomarkers.

Role of the funding source: Ciphergen Biosystems was involved in designing the biomarker identification experiments. *For clarification, Dr. Rob Christner did not participate in the collection, analysis or interpretation of the data from either stage 1 or 2 of the*

study. However, his assistance during the initial optimization of the SELDI conditions (which led to the 10-fold dilution, choice of the H4 array and laser protocols used subsequently throughout this study) as well as during the identification of the biomarkers have been considered essential and worthwhile for authorship. The NICHD intramural program provided per request the biological samples and demographic data used in stages 1 and 2. None of the funding sources had other involvements in study design, interpretation of data, writing of the report or decision to submit the paper for publication.

APPENDIX V

BJOG: an International Journal of Obstetrics and Gynaecology
February 2005, Vol. 112, pp. 173-181

DOI: 10 1111/j.1471-0528.2004 00340.x

Proteomic biomarker analysis of amniotic fluid for identification of intra-amniotic inflammation

Irina A. Buhimschi,[a] Rob Christner,[b] Catalin S. Buhimschi[a]

* * *

METHODS

* * *

The study was conducted in two stages. In the first stage, 77 samples from patients with known outcomes

[a] *Department of Obstetrics, Gynecology and Reproductive Sciences, Yale University, New Haven, Connecticut, USA*

[b] Ciphergen Biosystems, Fremont, California, USA

Correspondence: Dr I A Buhimschi, Department of Obstetrics, Gynecology and Reproductive Sciences, Yale University School of Medicine, 333 Cedar Street, LCI 804, P.O. Box 208063, New Haven, Connecticut 06520-8063, USA.

were used to uncover relevant proteomic patterns. The samples used were collected from January 1993 through October 2001, and were stored at -80°C until we assessed them from May 2001 to April 2002.

* * *

Acknowledgements

The authors would like to thank Dr Jon Nuss from Wright State University for the SELDI compatible peptide elution protocol. The authors thank the Department of Health and Human Services, (NIH/NICHD) for providing part of the biological samples and funds for some materials. They are indebted to the residents, nurses and faculty at Wayne State University that colleted the samples. Since our initial work submission and patent applications [Buhimschi I, Christner R. WO Pat. 2004/043238 A2, Pat. Appl. 60/426,O96; filed 14 November 2002 and Buhimschi I, Christner R, Buhimschi C, Weiner CP. PCJ/US2003/036118 filed February 2003] a preliminary communication in the July 2004 issue of JAMA (Gravett MG, et al. *JAMA* 2004:292:462–469) confirmed aspects of our work in a separate group of women.

* * *

Accepted 16 June 2004

APPENDIX W

[LOGO]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

National Institutes of Health
National Institute of Child Health and Human Development
Office of the Scientific Director
Division of Intramural Research
Building 31, Room 2A46
31 Center Drive MSC 2425
Bethesda, MD 20892-2425
Voice Mail: 301-594-5984
FAX: 301-480-3869
E-MAIL: or5h@nih.gov

May 20, 2005

E. Ray Stinson, Ph.D.
Assistant Vice President for Research
Wayne State University
4009 FAB
656 West Kirby
Detroit, MI 48202
Fax: 313-577-3626

Dear Dr. Stinson:

I am in receipt of your fax of May 18, 2005 about the publication of the paper in the British Journal of Obstetrics and Gynaecology entitled, "Proteomic biomarkers analysis of amniotic fluid for identification of intra-amniotic inflammation" and the findings of the Scientific Misconduct Investigative Committee of Wayne State University where Dr. Irina Buhimschi was a faculty member. This is the reply to the questions you asked:

1. NICHD considers that the work described in the manuscript originally submitted to The Lancet around the end of October 2002 and the paper published in the British Journal of Obstetrics and Gynaecology entitled, "Proteomic biomarker analysis of amniotic fluid for identification of intra-amniotic inflammation" refer, fundamentally, to the same scientific work and that the work was conducted, in part, by members of the Division of Intramural Research of NICHD, NIH, DHHS.

2. Yes, NICHD believes that Dr. Romero and Dr. Chaiworapongsa should have been listed as coauthors on the publication in the British Journal of Obstetrics and Gynaecology.

* * *

4. Drs. Romero, Edwin and Chaiworapongsa were granted authorization to provide information to the Wayne State University Committee of Inquiry and subsequently to the Investigative Committee.

Sincerely,

/s/
Owen M. Rennert, M.D.
Scientific Director
Division of Intramural Research
National Institute of Child Health
and Human Development
National Institutes of Health
Department of Health and Human Services

APPENDIX X

[LOGO]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Public Health Service
National Institutes of Health

National Institute of Child Health
and Human Development
Perinatology Research Branch
4707 St. Antoine Blvd., Dept. Ob/Gyn
Detroit, MI 48201
Tel: (313) 993-2700
Fax: (313) 993-2694

June 2, 2003

John Oliver, Ph.D.
Vice President for Research
And Dean of the Graduate School
Wayne State University
656 W. Kirby / Room 4043 F/AB
Detroit, MI 48202

George Dambach, Ph.D.
Past Vice President for Research
And Dean of the Graduate School
Wayne State University
1213 Scott Hall
Detroit, MI 48202

Dear Dr. Oliver and Dr Dambach:

This is to inform you that last Friday, May 30, 2003, I had a telephone conversation with Dr. Charles Young, Editor of the Lancet about the manuscript entitled "Proteomic analysis of amniotic fluid for the rapid identification of intra-amniotic inflammation leading to preterm delivery" authored by Dr. Irina Buhimschi, Dr. Rob Christner, Dr. Catalin Buhimschi, Dr. Chenthil Rathnasabapathy, Dr. Samuel Edwin, Dr. Tinnakorn Chaiworapongsa, and Dr. Roberto Romero, which was submitted for consideration in the Lancet last October (enclosed).

I was informed by Dr. Irina Buhimschi, via e-mail, on February 12, 2003 that the Lancet was interested in the manuscript but that it required extensive revision. I offered to assist in revising the manuscript via e-mail the same day and received no reply (copy of e-mail enclosed). On March 12, 2003, I sent an e-mail to Dr. Irina Buhimschi, requesting to see the comments of the reviewers of the Lancet and received no reply (enclosed). Drs. Chaiworapongsa, Edwin and Rathnasabapathy, who are members of the Perinatology Research Branch or affiliated with the Branch, told me that they have not received any information about the status of the manuscript, the comments of the reviewers or the revised version of the manuscript.

Dr. Young advised me last Friday that Dr. Irina Buhimschi had submitted a revised version of the manuscript and deleted the names of Drs. Chaiworapongsa, Edwin, Rathnasabapathy and Roberto Romero from the list of authors. This manuscript has now been accepted for publication by

the Lancet. Dr. Young had assumed that the corresponding author, Dr. Irina Buhimschi, had communicated with the rest of the coauthors listed in the version originally submitted last October. The guidelines of the Lancet state that the corresponding author is responsible for "communicating with the other authors about revisions and the final approval of the proofs". I informed Dr. Young that neither I, nor other members affiliated with the Perinatology Research Branch, have received any information about the manuscript from Dr. Irina Buhimschi as of last Friday.

I have an obligation to inform you of this serious matter and would like to ask for the assistance of your office in addressing and resolving this problem. I informed the Scientific Director of NICHD today of this matter. I am sending a copy of this letter to Dr. Young at the Lancet so that all parties are informed. After our communication of today, I believe that it is more appropriate that you communicate directly with Dr. Irina Buhimschi, since she is a Wayne State University employee and not an NIH employee. My hope is that we will be able to satisfactorily resolve this matter.

At your request, I am enclosing the contact information of Dr. Charles Young at the Lancet:

Phone: 011-44 20 7424 4910
Fax: 011-44 20 7424 4911
e-mail: charles.young@lancet.com

Sincerely,

/dictated but not signed/

Roberto Romero, M.D.
Chief, Perinatology Research Branch
Intramural Division, NICHD

Encl.

RR/acp

APPENDIX Y

Buhimschi, Irina
Inquiry Report August 28, 2003

* * *

Summary

Findings:

1. On May 30, 2003, Dr. Romero had a conversation with Dr. Charles Young, Editor of The Lancet in which Dr. Young indicated that a revised version of the manuscript had been submitted and that Drs. Chaiworapongsa, Edwin, Rathnasabapathy and Romero had been deleted from the list of authors.

* * *

3. On June 4, 2003. Dr. Irina Buhimschi was notified that a pre-inquiry would be initiated to determine if the allegations provided in Dr. Romero's letter of June 2, 2003 warranted an inquiry and/or investigation. The purpose of the pre-inquiry was to determine if the authorship dispute could be resolved without initiating a scientific misconduct inquiry and/or investigation.

4. The following mechanisms were used to attempt to communicate with Dr. Irina Buhimschi:

- email versions of written communication;
- printed versions of written communication sent via overnight mail to her home address; and
- printed versions of written communication mailed to her University address

After the Office of the Vice President for Research was notified that mail sent by overnight mail would be returned, a copy of the communication was submitted to Sean Fitzgerald, Associate General Counsel, who submitted the electronic version of the communication to her attorney. After she became a faculty member at Yale University, a copy was mailed to her department

* * *

6. On June 10, 2003, Dr. Buhimschi was notified that a pre-inquiry would be conducted to determine if the allegations warrant an inquiry and/or investigation.

* * *

8. On June 12, 2003, Dr Irina Buhimschi was notified that an official inquiry of scientific misconduct would be conducted.

* * *

11. On June 23, 2003, at 11:00 a.m. Dr. Catalin Buhimschi did not appear for the meeting that was scheduled with Dr. Stinson. Later that day

he submitted his keys and University ID badge to the secretary in the department.

12. On June 30, 2003, Drs. Sokol and Malone notified the Office of the Vice President for Research that they would like to be added as complainants into the allegations of scientific misconduct for the apparent actions taken by Dr. Irina Buhimschi.

13. * * *

On July 30, 2003, Dr. Buhimschi was informed that an investigation would be initiated. The purpose for transferring the inquiry into an investigation was that Dr. Buhimschi failed to cooperate with the inquiry, one of the criteria identified in University policy.

An Investigating Committee has been appointed and consists of the following individuals:

Dorothy Nelson, Ph.D., Professor, Internal Medicine, Wayne State University
Chris-Ellyn Johanson, PhD., Professor, Psychiatry; Wayne State University
Joe Shore, Ph.D., Chief, Division of Biochemistry, Henry Ford Health System
E. Ray Stinson, Ph.D., Assistant Vice President for Research, Wayne State University, ex officio

Submitted: /s/_____

E. Ray Stinson, Ph.D.
Assistant Vice President for Research

Date: August 28, 2003

APPENDIX Z

FILE COPY

WAYNE STATE UNIVERSITY
Office of the Vice President for Research
Room 4009 Faculty Administration Building
656 W. Kirby
Detroit, MI 48202
(313) 577-9064
(303 577-3626 (Fax)
e.ray.stinson@wayne.edu

September 3, 2003

Irina Buhimschi, M.D.
FMD 339
Department of Obstetrics and Gynecology
School of Medicine
Yale University
New Haven, CT 06520

RE: Scientific Misconduct Investigation Notification
Inquiry Report

Dear Dr. Buhimschi:

Enclosed please find a letter from Dr. John Oliver, Vice President for Research, indicating that the inquiry that you have previously been notified about has been conducted and that the University has decided to proceed with a full investigation (Policy and Procedures Regarding Scientific Misconduct). We

postponed sending you the letter until the Inquiry Report was completed.

* * *

If you have any questions regarding the inquiry, the upcoming investigation, etc., please contact me at (313) 577-9064 or email me at e.ray.stinson@wayne.edu.

Sincerely yours,

/s/

E. Ray Stinson, Ph.D.
Assistant Vice President for Research

* * *

APPENDIX AA

[LOGO]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Public Health Service
National Institutes of Health

National Institute of Child Health
and Human Development
Perinatology Research Branch
4707 St. Antoine Blvd., Dept. Ob/Gyn
Detroit, MI 48201
Tel: (313) 993-2700
Fax: (313) 993-2694

CONFIDENTIAL

June 30, 2003

E. Ray Stinson, Ph.D.
Asst. Vice President for Research
Wayne State University
4009 FAB
656 West Kirby
Detroit, MI 48202

Dear Dr. Stinson:

Further to our conversation of last Friday, June 27, 2003, this is to confirm my understanding that Wayne

State University has opened an inquiry into allegations of scientific misconduct of a Wayne State University faculty member, Dr. Irina Buhimschi. I understand that the basis for this inquiry is information that I provided to the office of the Vice President for Research at Wayne State University, Dr. John Oliver, on June 2, 2003 and, subsequently, to you. The Office of the General Counsel at NIH indicated to me that, if the basis for the inquiry is information provided by me to you or the Vice President of Wayne State University, then my role in this inquiry is one of a complainant. I am confirming, therefore, that this is, indeed, my role. Dr. Robert Sokol, Distinguished Professor of Obstetrics and Gynecology and Dr. John Malone, Chairman of the Department of Obstetrics and Gynecology, have told me that they will also be complainants in this inquiry. I am asking for confidentiality for the protection of all parties.

In bringing this matter to the attention of Dr. Oliver and you, I am acting in my official capacity as a NIH employee with an obligation to protect the interests of NICHD, NIH, DHHS.

Sincerely,

/s/
Roberto Romero, M.D.
Chief, Perinatology Research Branch
Intramural Division, NICHD

RR/acp

212a

6/30/03
hand-delivered
by Freda
4 pm
acp

APPENDIX BB

AFFIDAVIT OF JOHN M. MALONE, Jr., M.D.

* * *

2.

I have read the letter of appeal of Dr. Irina A. Buhimschi, addressed to Dr. Hilary Y. Ratner, Associate Provost and Dean of Wayne State University, dated January 20, 2005.

3.

I was Chairman of the Department of Obstetrics and Gynecology of Wayne State University and Specialist in Chief of the Detroit Medical Center while Dr. Irina Buhimschi was a faculty member at Wayne State University and Dr. Catalin Buhimschi was a Fellow in Maternal Fetal Medicine under the supervision of Dr. Yoram Sorokin.

4.

I never asked Dr. Irina Buhimschi to provide "gift authorship" to Dr. Lance Liotta or anyone else.

6.

I have read the entry 1.25 on page 8 of 35 in the Appeal Letter of Dr. Irina Buhimschi. I certify that I never told Dr. Irina Buhimschi and/or Dr. Catalin

Buhimschi that there was a "high level of corruption" at Wayne State University

7.

I deny that my actions created an improper atmosphere for dialogue, especially on issues such as authorship attribution (found on page 10 of 31 of the Appeal Letter from Dr. Irina Buhimschi to Dr. Hilary Ratner).

8.

I asked Wayne State University to add my name as a Complainant against Dr. Irina Buhimschi in the investigation into allegations of scientific misconduct filed against her. I did so because I had an obligation to safeguard the scientific integrity of the Department of Obstetrics and Gynecology at Wayne State University and the Detroit Medical Center under my leadership. I made this decision of my own accord and without a request by Dr. Roberto Romero.

* * *

10.

I received a request from Dr. Irina Buhimschi to fund her travel to a course to learn proteomics in Geneva, Switzerland. After consultation with others, including Dr. Roberto Romero, I approved funding of this request which involved several thousand dollars. This was an investment of my Department in furthering the education of Dr. Irina Buhimschi and her husband, Dr. Catalin Buhimschi.

FURTHER AFFIANT SAYETH NOT.

/s/John M. Malone, Jr.
John M. Malone, Jr.

Signed before me on this

6th day of August, 2008.

Notary Public /s/ Heather A. Millar

HEATHER A. MILLAR
NOTARY PUBLIC, STATE OF MI
COUNTY OF MACOMB
MY COMMISSION EXPIRES Sep 22, 2012
ACTING IN COUNT OF WAYNE

[SEAL]

APPENDIX CC

From: John Storella [jstorella@ciphergen.com]
Sent: Thursday, October 31, 2002 9:46AM
To: Buhimschi, Irina
Cc: Rob Christner; James Maki; Anne.DiSante@wayne.edu
Subject: RE: paper submission to The Lancet

Dear Irina:

Thank you for your email. This situation does not change the patent situation, as I intend to proceed with the present mauscript for patent purposes.

Best regards,
John

-----Original Message-----
From: Buhimschi, Irina [mailto:ibuhimsc@med.wayne.edu]
Sent: Wednesday, October 30, 2002 4:41 PM
To: John Storella
Subject: paper submission to The Lancet

Dear John,
I would like to let you know that Dr. Romero and I had a disagreement regarding his proposal to delay the submission of the manuscript for publication and authorship. His suggestion was to have Dr. Lance Liotta consult the manuscript, at the present time, verify the data and bring contributions to the paper at

an extent that would allow him to become a co-author if he so chooses. * * *

* * *

APPENDIX DD

[LOGO]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Public Health Service
National Institutes of Health

* * *

October 14, 2003

Irina A. Buhimschi, M.D.
Department of Obstetrics and Gynecology
Yale University School of Medicine
New Haven, CT 06520-8063
Fax: 203-785-4713

Dear Irina:

I received your e-mail messages sent last August 28, September 5, September 12, September 15, September 24, as well as one responding to my e-mail message of September 28. Because I wanted to acknowledge receipt of your communications and convey my desire to address the problems at issue, I responded briefly to each of your e-mail messages, even though I was traveling abroad, or about to leave. I have also shared your communications with NICHD officials.

In your e-mail messages, you made a number of statements about our collaborative projects with which I do not agree. However, I do not believe it would be

productive to enumerate and respond in detail to each of these. What I would like to do instead is to set form my position and that of NICHD officials concerning our collaboration in the hope of resolving the outstanding issues.

* * *

When Dr. Charles Young, Senior Editor of the *Lancet*, informed me that you had removed our names from authorship, I asked officers of Wayne State University to communicate directly with you to address the problem. I requested that a serious attempt be made to resolve this matter without invoking the Scientific Misconduct Policy of Wayne State University. Yet, University officials informed me that you refused to cooperate with them. Moreover, NIH officials advised me that Wayne State University had an ongoing contractual obligation to protect the interests of NICHD from the actions of its employees. They specifically recommended that I should not direct Wayne State University in the handling of this situation to avoid waiving NICHD's right to seek redress from the University because of your actions. Subsequently, Wayne State University indicated that the efforts to resolve the matter without invoking the Scientific Misconduct Policy were unsuccessful and that the next step was to utilize this policy. NICHD officials were informed of this and there was no option but to participate in the process at Wayne State University, as I had brought your actions to their attention. NICHD has expectations about the handling of this matter, which relate to representations made to our Institute by offerors during the procurement process to house the Perinatology Research Branch. More than one university proposed to handle similar

situations to the one at hand by invoking its Scientific Misconduct Policy.

Thus, the difficulties stem from what has emerged as a consistent pattern of conduct. You represented to me and others that we were going to conduct collaborative research and requested access to samples, reagents and technical personnel to carry out such collaborative research. We then discussed results and participated in the drafting of abstracts and one of the manuscripts. Then, when the Branch had provided enough support to make it possible to draft a manuscript, you unilaterally discontinued communications, submitted/ revised manuscripts, and then alleged that the Perinatology Research Branch staff did not meet the criteria for authorship. * * *

* * *

I have learned through two different individuals that you have told them that your actions to delete the names of individuals affiliated with the Perinatology Research Branch from the proteomic paper submitted to the *Lancet* was at least, in part, in response to the publication of the paper on antimicrobial proteins in amniotic fluid by the Perinatology Research Branch. These two projects were unrelated. Moreover, the assays for hematopoietic defensins and calprotectin were performed weeks before you asked me for the sample of amniotic fluid for the proteomic study. Documentary evidence from the laboratory records will confirm this. Also, recall that I invited you to make a contribution to this manuscript and join us in authorship before the submission of the manuscript and you declined on the basis that you did not want people to believe that your findings in the proteomic

study had been informed by the observations that we had made with the use of immunoassays for defensins and calprotectin.

APPENDIX EE

From: Charles Lockwood [SMPT:chairobgyn@yale.edu]

* * *

Sent: 10/20/2003 8:28 PM

Dear Roberto:

Just got the fax, many thanks for "cc'ing" the letter and your explanatory cover note. I think I had a sense of all the various issues described but your fax summarized events in a clear and unambiguous manner. I will try and call tomorrow, Monika will coordinate our schedules. I am sure I don't have to tell you that you have my total confidence and complete support in this matter, and that of the University at its highest levels.

All the best, CJL

* * *

APPENDIX FF

Date: Sat, 27 Dec 2993 13:12:04 -0500

From: cj143@email.med.yale.edu

To: Irina Buhimschi <irina.buhimschi@yale .edu

* * *

Subject: Re: your message from Dec 24

* * *

Irina your language seemed far harsher than his. I would not send anymore e-mails without your lawyer's approval. * * * it is my understanding that Wayne State and not the NIH has both initial and final jurisdiction over this matter and that if they find you have committed academic misconduct there is no appeal to the NIH. Obviously, such a finding would prompt action by Yale. Thus, the situation could not be more serious. I would be bending over backwards to settle this ASAP if I were you.

* * *

APPENDIX GG

BJOG
An International Journal of
Obstetrics and Gynecology

STATEMENT OF DISPUTED AUTHORSHIP

* * *

* * * BJOG has neither the ability nor the obligation to investigate the authorship of every manuscript submitted. We rely, in good faith, on the written assurance of the submitting authors that submitted work is entirely their own, that it has not previously been published by themselves or others, and that all those who qualify to be listed as authors have been included. However, BJOG has consulted with an independent panel of the Committee On Publication Ethics (COPE*) about the procedures followed when assessing the suitability of this manuscript for publication. The panel has recommended that when a BJOG editor is aware that there may be a dispute about authorship, the editor involved should seek a

* COPE, Committee on Publication Ethics BMA House, Tavistock Square, London WC1H9JR United Kingdom. http://www.publicationethics.org.uk/about

BJOG would like to thank the members of the COPE panel for their advice; they were:
Dr Harvey Marcovitch (Panel Chairman and Chairman of COPE)
Dr Richard Green (COPE Ombudsman)
Ms Liz Wager (Member of COPE Council)

resolution of the dispute before publication (COPE Code of Conduct for Editors). This did not happen in this case. In future, BJOG undertakes to make its best endeavours to comply with this Code of Conduct.

Should all the authors listed above agree that a change in authorship is appropriate, or should an appropriately constituted body after due process recommend a correction of authorship, then BJOG will publish this correction. Until then, we must continue to rely upon the veracity of our authors' written declarations.

APPENDIX HH

YALE UNIVERSITY SCHOOL OF MEDICINE

* * *

Dr. Jim G. Thornton, Editor-in-Chief
British Journal of Obstetrics and Gynecology
27 Sussex Place, Regent's Park
London NWI 4RG, UK

March 14, 2005

Dear Dr. Thornton,

Thank you for your letter dated February 11, 2005. In response to the authorship claim made by Wayne State University on behalf of Dr. Roberto Romero, I would like to attach the appeal letter that was forwarded to the Office of Provost at WSU January 2005. I will also provide the Editorial Board of the BJOG with all the original documents used in support my arguments. Essentially, the facts remain unchanged since my last series of communications with the BJOG editors. * * * In fact, the NIH-Office of Research Integrity had the opportunity to review all the facts and the evidentiary documentation first hand and concluded that no scientific misconduct has occurred. * * *

* * *

Sincerely,

/s/
Irina A. Buhimschi, MD
cc. Dr. Donald Peebles, Dr. Carl P. Weiner

APPENDIX II

From: Price, Alan [Aprice@OSOPHS.DHHS.GOV]
Sent: Monday, November 22, 2004 5:18 PM
To: 'irina.buhimschi@yale.edu'

* * *

But I would not cite ORI in your letters to WSU since ORI has no authority in this case. * * *

Alan Price
ORI

* * *

APPENDIX JJ

Date: Fri, 12 Nov 2004 17:08:15 -0500
From: andrea gendrachi * * *
Subject: Paper in BJOG

* * *

Hi Irina and Catalin,

Ed K. gave me a copy of "Proteomic biomarker analysis of amniotic fluid for identification of intra-amniotic inflammation."

- Would like to write a press release. Can you send paper via PDF?

- I don't see a pub date. Can you let me know when it was published?

Thank you.

* * *

Date: Fri, 12 Nov 2004 17:29:37 -0500
From: "Dr. Buhimschi" * * *
Subject: Re: Paper in BJOG
To: andrea gendrachi * * *

* * *

Dear Andrea,

It was published 48 h ago on-line. You can track the manuscript via BJOG web site, early on-line. Please also note that there is a second manuscript published also by us on the same issue

* * *

APPENDIX KK

Office of Public Affairs at Yale - News Release

YALE News Release

CONTACT: Karen N. Peart 203-432-1326 or karen .peart@yale.edu #022

For Immediate Release: January 26, 2005

Premature Births from Inflammation and Infection Rapidly Detected by Proteomics Technology

New Haven, Conn. -- A combination of four proteins that result from inflammation and infection and lead to premature birth can be rapidly and accurately detected in the amniotic fluid of pregnant women using proteomics technology, Yale researchers report in two studies in the February issue of British Journal of Obstetrics and Gynecology.

Using proteomics science, the Yale team, in collaboration with two other academic institutions, developed a novel method called MR scoring to discriminate healthy from diseased women in whom preterm delivery is impending and the health of the fetus is in danger. MR scoring relies on identification of a group of proteins that serve as biomarkers characteristic to women who will deliver preterm. The proteins detected are Human neutrophil defensin 1,

Human neutrophil defensin 2, Calgranulin C and Calgranulin A.

"We are probably at a turning point in the history of preterm labor diagnosis," said Irina Buhimschi. M.D., research scientist in the Department of Obstetrics & Gynecology and Reproductive Sciences. "While many proteins are present in the amniotic fluid, not all are biomarkers with diagnostic significance."

About 50 percent of women who deliver prematurely have evidence of inflammation in the amniotic fluid. In the current study, Buhimschi and co-authors analyzed stored samples of amniotic fluid from 107 women, some diagnosed with rupture of the membranes or twins and eventually delivered prematurely. The sensitivity and specificity of the MR score in identifying women who had infection and inflammation and delivered earlier reached 100 percent. The four biomarkers are necessary and sufficient to separate between sick and healthy patients.

Buhimschi said the current "gold standard" for infection consists of amniotic fluid culture, which takes days to obtain results. A proteomic diagnostic test for infection and inflammation could probably be performed much faster than the current available laboratory tests. Other current tests have poor sensitivity and specificity and are not available in time for rapid clinical decisions.

The team will present another clinical application of their research (cervical incompetence) during the Plenary Session in February at the 2005 Annual Meeting of the Society for Maternal Fetal Medicine in

Reno, Nevada. Other authors include Catalin Buhimschi, M.D. of Yale, Rob Christner of Ciphergen Biosystems and Carl P. Weiner of University of Maryland. The study was funded by the National Institutes of Health and Ciphergen Biosystems.

Citation: British Journal of Obstetrics and Gynecology, Vol. 112 p. 173-181; 250-255.

###

http://www.yale.edu/opa/newsr /05-01-26-03.all.html

APPENDIX LL

WAYNE STATE UNIVERSITY

DIVISION OF RESEARCH

January 31, 2005

* * *

Dear Professor Thornton:

I am writing to you in reference to a manuscript entitled, "Proteomic biomarker analysis of amniotic fluid for identification of intraamniotic inflammation" co–authored by Irina A. Buhimschi, Rob Christner and Catalin S. Buhimschi to be published in the February issue of the *British Journal of Obstetrics and Gynaecology* (volume 112: pages 173-181), which is now available electronically. My office became aware of this publication from a Yale University press release published on January 26, 2005.

We are contacting you to inform you that the work described in this manuscript was conducted at Wayne State University and represents the collaboration of scientists from our University, Ciphergen(a U.S. biotechnology company) and the Intramural Program of National Institute of Child Health and Human Development, National Institutes of Health, Department of Health and Human Services. * * *

After repeated attempts by the Assistant Vice President for Research of our University to resolve this matter, it was clear that Dr. Irina Buhimschi did not wish to cooperate. * * * An Investigative Committee (IC) was then constituted. The preliminary findings of the IC were:

> "The IC has determined that misconduct occurred and that I. Buhimschi was responsible for this [that] misconduct. * * * *"

The deviations from the normal scientific process were characterized by the IC as serious and damaging to the scientific careers of the deleted authors. Dr. Irina Buhimschi and Yale University were informed of these findings and Dr. Buhimschi has filed an appeal. The appeal is being reviewed by the Provost of Wayne State University.

We were surprised to find that the article is now published in the *British Journal of Obstetrics and Gynaecology,* despite the fact that it was the subject of an ongoing investigation of scientific misconduct and that Dr. Irina Buhimschi was fully aware of this. I noted that the article was accepted on June 16, 2004. We are writing to you to inquire whether your office had been appraised of these facts by Dr. Buhimschi and to ask for your cooperation in establishing what has transpired.

* * * Specifically, I am asking whether your journal asks submitting authors whether the work is currently under consideration by another journal and/or does your journal ask the corresponding author about whether the manuscript bas been submitted to another journal. I would also like to know the original

submission date and the date of any reviews. We realize that you may not be aware of these facts and may be even surprised by this letter, but Wayne State University is willing to share with you the relevant information so that you can be informed of what has transpired and why we have an obligation to pursue this matter.

* * *

Sincerely,

/s/
John P. Oliver, Ph.D.
Vice President for Research

* * *

APPENDIX MM

* * *

Jim G. Thornton, Editor in Chief
Email: jthornton@rcog.org.uk

* * *

24 February 2005

John P. Oliver PhD
Vice President for Research
Wayne State University
4009 Faculty/Administrative Building
Detroit, MI 48202
USA

Dear Dr Oliver

* * *

Thank you for your letter of 31 January 2005. Indeed I was aware of an authorship dispute about this paper. Both I and the scientific editor who dealt with the manuscript, Dr. Peebles, have corresponded on this matter with Dr. Buhimschi and her head of department, Dr Carl Weiner.

* * *

Can I assure that:

1. BJOG will cooperate fully in any investigation.

2. If it is finally found that the authorship of the disputed article was wrong we will publish a correction.

For your information I am in possession of the following documents:

1. Email correspondence between Carl Weiner and me, dated 10 and 13 October 2003.

2. Email correspondence between Dr. I Buhimschi and Dr Peebles.

3. Letter to Dr I Buhimschi from Dr Alan R Price of The Office of Research Integrity date 3 February 2004.

4. Memorandum from Stephen A Bent, dated October 29, 2003 re. Inventorship assessment of US application 60/426,096 (filed 14 November 2002). Biomarkers for intra-amniotic inflammation.

5. A number of electronic consultation documents between the BJOG editors, and a minute of a face-to-face editorial meeting between four BJOG editors.

If you wish to see any of these I personally would be happy to forward them. However, I am copying this letter to Dr I Buhimschi and Dr Carl Weiner to give them the opportunity to object. Some of them were sent to us in confidence.

I hope that this dispute can be resolved satisfactorily.

Best wishes

Yours sincerely

J G Thornton
Editor-in-Chief BJOG

Copies to: D Peebles
I Buhimschi
C Weiner
E Ray Stinson

APPENDIX NN

EXCERPT FROM
APPELLANT'S CORRECTED PRINCIPAL BRIEF
In the United States Court of Appeals
for the Sixth Circuit
Docket No. 09-1195
Date of Filing, November 9, 2009

* * *

[p. 26] * * *

II. THE DISTRICT COURT'S FACTUAL FINDINGS WERE INCONSISTENT WITH THE RECORD BEFORE THE COURT AND LEGALLY ERRONEOUS.

The district court's recitation of facts is inaccurate and inconsistent with the record that was before the court and the standard [p. 27] it was required to apply in reviewing the record. * * * The court did not correct factual errors after they were drawn to its attention, **Dock.No.154-#1** at 5-13, but declared plaintiff's showing "groundless" after striking his exhibits. **Dock.No.162** at 1, ¶ 1. * * * The following are the most salient misstatements of fact in the court's opinion:

1. The dispute over authorship did not erupt "[a]fter the research was completed" **Dock.No.151** at 6, ¶ 2. The research was completed on June 19, 2002, **Dock.No.92-#3** at 5 (TWIMC letter), after which

Buhimschi listed Romero as an author on the SMFM abstract and *Lancet Manuscript*, **Dock.Nos.90-#4 & 90-#5**, acknowledged that the work could not have been possible without Romero, **Dock.No.93-#10** at 4 (Buhimschi-Romero email, 09/27/02, stating, "Catalin and I would like to thank you as it would not have been possible without you"), and agreed that his contribution to any patentable invention underlying the research was equal to hers. **Dock.No.91-#1** (IDF). The dispute over [p. 28] authorship "erupted" after Romero discovered that Buhimschi had unilaterally removed Romero's name from the authorship of the revised *Lancet Manuscript*. **Dock.No.125-#4** at 2.

2. The dispute over authorship was also not genuine. Buhimschi's own "pre-removal" accounts of Romero's contribution to the SELDI research, **Dock.Nos.92-#3** at 5 & **93-#11**, are inconsistent with the varying "post-removal" accounts she gave to The Lancet, **Dock.No.93-#14** at 1 (Romero's only contribution the ELISA data); to the BJOG, **Dock.No.119-#4**, ¶ 1.6 (ELISA data added at Romero's insistence to ensure he would meet the criteria of authorship), but *see id.*, ¶ 2.5 (stating that the defensin ELISAs for the SELDI research were run at Buhimschi's request); and at Yale, **Dock.No.119-#6** at 2, ¶ 4 (Cohen's letter stating that Romero required Buhimschi "to add himself and three others and their data for their own professional advantage").

And Buhimschi did more than remove Romero's name from the revised *Lancet manuscript*. In a "Conflict of Interest Statement", Buhimschi misrepresented the inventors on the November 14, 2002 patent application as being herself, her husband and Christner, [p. 29] **Dock.No.91-#3** at 11 (galley

proofs),[9] changed the date proteomic profiles were first observed in AF from August, 2001, *id.* at 11 ("Contributors") to May, 2001, **Dock.No.91-#6** at 2, cl. 2, ¶ 2 (BJOG article), and made other changes to the acknowledgment section of the BJOG article. *Compare* **Dock.Nos.91-#3** at 11& **91-#6** at 8. A genuine dispute over authorship cannot explain these falsifications.

3. Buhimschi's failure to participate in WSU's investigation had nothing to do with her move to Yale as stated in the court's opinion. **Dock.No.151** at 14. Buhimschi joined the Yale faculty on July 1, 2003, **Dock.No.126-#7** at 2 (Cohen-Lockwood memo), and the investigation did not begin until two months after Buhimschi moved to Yale. **Dock.No.126-#4** at 1 (Stinson-Buhimschi letter, 09/03/03, notifying Buhimschi of forthcoming investigation). The hearing Buhimschi refused to attend was held on January 26, 2004, **Dock.No.94-#3** at 5, and WSU offered to pay for Buhimschi and her husband to travel from Connecticut to Detroit. **Dock.No.39-#12** at 14, ¶ 4 (Stinson-Thornton [p. 30] letter, 06/27/05).

4. The court's statement that Yale formed an AHC on being notified of the WSU-IC's findings or on being asked to ensure that the revised *Lancet Manuscript* was not published without proper attribution, **Dock.No.151** at 17, ¶ 1 & at 21, ¶ 1, is also incorrect or at best misleading. WSU notified Yale of the WSU-IC's findings on October 7, 2004, **Dock.No.130-#5**, and made the foregoing request on October 19, 2004,

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[9] Romero was listed as a co-inventor on the patent application filed on November 14, 2002. **Dock.No.91-#1** (IDF) & **94-#9** (FoleyLarner inventorship assessment at 1).

Dock.No.130-#6 at 1, ¶ 5. Yale did not appoint the AHC until May 4, 2005, **Dock.No.119-#6**, by which time WSU's request was impossible to implement because the BJOG article had already been published. **Dock.No.91-#6**.

5. The district court's inference that WSU notified various individuals of its WSU-IC's findings to further "Romero's scientific reputation", **Dock.No.151** at 21, is incorrect as a matter of fact, and an improper inference on summary judgment as a matter of law. *Compuware*, 499 F.3d at 525. Oliver notified individuals who were required by Section 7.2 of WSU's Procedures to be notified. **Dock.No.125-#7** at 7. Federal regulations required WSU to have policies and procedures on scientific misconduct and to abide by them. [p. 31] *See* 42 C.F.R. § 93.302(2)(ii).

6. Finally, and most importantly, the court inaccurately portrayed the parties as *in pari delicto*, and Buhimschi's defamations as merely recitations of her "version of the facts" before "various fora" that were merely responses to earlier accounts of the same events by Romero before the same fora. **Dock.No.151** at 13, 20-21. Not only is this factually incorrect, exactly the opposite occurred.

Buhimschi recounted her version of events at Yale *before* Romero (to Lockwood and Naftolin), shortly after moving to Yale, **Dock.No.126-#7**. Naftolin then contacted Romero, and met with him in Washington, D.C., to get *his response to Buhimschi's account*, not the other way around. **Dock.No.124** at 25, ¶ 1 and 35, ¶ 1 (Romero-Naftolin letters, 08/18/03 & 08/28/03).

Buhimschi also recounted her version of events to the BJOG *before* Romero, through Weiner, on October 10, 2003. **Dock.No.39-#11** at 6-7. The "version of the facts" in Buhimschi's appeal letter was not and *could not* have been responsive to an earlier account of the same events by Romero because Thornton did not follow through on his intention to get Romero's version of the facts in 2003, **Dock.No.39-** [p. 28] **#11** at 5, and Oliver did not recount Romero's version of the underlying facts in his January 31, 2005 letter to Thornton. **Dock.No.94-#5**. WSU & Romero responded to Buhimschi not the other way around. **Dock.Nos.39-#12** at 5, (penultimate paragraph) & **39-#13** at 1, ¶ 2.

Romero agreed to become a complainant within the meaning of WSU's Procedures on the instruction of NIH attorneys after attempts to resolve the matter informally with Buhimschi failed. **Dock.No.126-#5**. Romero provided his "version of the facts" in the manner, and before the "forum", provided by WSU's Procedures - namely, at a hearing before the WSU-IC. **Dock.No.95-#5** at 1-94 (transcript of hearing). Buhimschi did not attend the hearing and actually *failed* to recount her "version of the facts" before the only forum that mattered Romero's statements were responsive to her allegations, **Dock.No.95-#5** at 40-76 (transcript of hearing) not the other way around.[10]

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[10] Buhimschi provided her "version of the facts" in letters to three other "fora"- The Lancet, ORI, and NIH officials outside NICHD. **Dock.Nos. 93-#14 & 129-#2 -#5, -#6, -#7,** None of her accounts were in response to Romero's "version of the facts". Romero presented no "version of the facts" to ORI or NIH officials other than his superiors, and Buhimschi's account to the Lancet was in response to Young's questions concerning Buhimschi's conduct. **Dock.No.91-#4.**

* * *

[p. 49] * * *

E. Romero did not consent to the publication of Buhimschi's defamations because Buhimschi and Yale knew Romero rejected them as false.

This Court's holding in *Compuware* stands for the self-evident proposition that a person cannot simultaneously object and consent to the same publication. Therefore, it would be unreasonable to imply consent to the publication of defamatory statements that Buhimschi and Yale knew Romero rejected as false. Buhimschi and Yale knew that Romero rejected Buhimschi's defamatory counter allegations as false before they published the defamations sued on from three different sources

Yale first learned from Romero's discussions with Naftolin in [p. 50] July and August 2003 that Romero rejected as false Buhimschi's claim that Romero had learned the identity of the antimicrobial peptides that were the subject of the JMFNM article from Buhimschi and her claim that Romero had republished the ELISA data in the original *Lancet Manuscript* in the JMFNM article without Buhimschi's knowledge. **Dock.No.120**, ¶ 19, 20.

Buhimschi and Lockwood next learned from Romero's October 14, 2003 letter that not only had Romero *not* republished the ELISA data published in the *Lancet Manuscript* in the JMFNM, but that the SELDI research and the study reported in the JMFNM were completely different projects, and that collection

of ELISA data for the JMFNM article were *completed* before Buhimschi had even asked Romero to collaborate on the SELDI research. **Dock.No.128-#2** at 4, ¶ 4.

Buhimschi and Yale further learned through Romero's testimony to the WSU-IC that Romero rejected several additional defamatory statements in Buhimschi's appeal letter long before she published that letter to the BJOG and Yale republished it to its AIC. **Dock.Nos.95-#5** at 40-94; *see also* **Dock.No.130-#6** at 1, ¶ 2 (Buhimschi and Yale [p. 51] received transcripts in October, 2004). Among the defamatory statements in Buhimschi's appeal letter that Buhimschi and Yale knew Romero rejected from his testimony before the WSU-IC were:

(1) that Romero had conducted "parallel experiments" without Buhimschi's knowledge based on information about biomarkers Buhimschi had provided to Romero, **Dock.No.95-#5** at 68:17-74:22;

(2) that Romero published part of the data in the original Lancet Manuscript in the JMFNM without Buhimschi's knowledge, *id.* at 75:1-77:8; and

(3) that Romero and WSU were conducting a witch-hunt to damage Buhimschi's reputation " to further their competitive interests and to try to gain advantage on a pending patent", *id.* at 51:13-53:4.

The district court's contention that *Compuware* does not control this case because "it is in intolerable

tension with precedents from the Michigan courts", **Dock.No.168** at 14, is not correct. The holding of *Compuware*, 499 F.3d at 526 - that where a plaintiff has made his disagreements with the subject matter to be published known, consent to the publication cannot be *implied* as a matter of law but becomes a question of fact for the jury - is entirely consistent with the well settled common law rule that the scope of a person's consent may be limited as to subject matter. *Restatement*, § 583, cmt. d. This *is* the law the [p. 52] Michigan Supreme Court would apply, and none of the cases relied on by the district court are to the contrary.

Relying on *Restatement*, § 583, cmt. c, the district court held that "consent to...publication is to be determined by the reasonable inferences from the conduct in the light of the circumstances surrounding it... [and not] an inquiry into whether the publication would occur if the plaintiff had limitless power to shape the circumstances in which he acts". From this unobjectionable premise the court concluded that "plaintiff's disagreement with a defamatory publication [is] relevant to but not usually determinative of his consent thereto". **Dock.No.168** at 11-12.

The court's conclusion is a non-sequitur. Consent is a question of fact. *Restatement*, § 892(1). For a court to imply consent from conduct, it must be so unequivocally clear from the conduct that the person gave his/her consent that reasonable minds could not differ over the question. *Ford*, 535 F.3d at 494. Objection to a publication *is* one of the circumstances in the light of which consent will *not* be implied but construed to be a fact question for the jury, *Compuware*, 499 F.3d at 526 (district court erred in

finding consent because "Compuware did not [p.53] agree with substantial portions of the report"), but not because it is determinative of the question of consent, but because if a person disagrees with the substance of a publication reasonable minds can differ over whether the person consented to the publication.

* * *

APPENDIX OO

EXCERPT FROM PETITION
FOR EN BANC REVIEW
In the United States Court of Appeals
for the Sixth Circuit
Docket No. 09-1195
Date of Filing, September 21, 1020

[p.1] **INTRODUCTION**

* * *

The appellate panel affirmed a construction of Michigan law, absurd on its face, that a person impliedly consents to have factually false, defamatory statements made about himself/herself with knowledge or reckless disregard of falsity merely by alleging wrongdoing against another. However, it is *how* the panel reached it decision, not its construction of Michigan law *per se*, that necessitates review by the full court, because to reach its decision, the panel: (1) disregarded U.S. Supreme Court and Sixth Circuit precedents that prescribe how the record must be reviewed on a motion for summary judgment; (2) disregarded material facts; (3) disregarded Michigan Supreme Court precedents and relied entirely on cases that have no [p.2] precedential value for its construction of Michigan law; and (4) disregarded other Six Circuit precedents, including *Compuware v. Moody's*, 499 F.3d 520 (6th Cir. 2007), which specifically addressed consent to defamation under Michigan law.

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[p.3] * * *

Of the many incorrect and misleading statements of fact in the panel's opinion, one of the most serious is the statement, "In spite of Romero's protests, the BJOG published the manuscript, without giving [p.4] credit to Romero or his team..." Opinion (Op) at 5. This statement implied that the BJOG considered the the facts before the panel, and concluded that Romero's contribution to the research did not merit authorship. This contention in turn supports the panel's rulings on Romero's defamation and other claims, and presumably that is why the panel made this statement. However, both the statement, and what it implies, are completely untrue, and flatly contradicted by facts in the record drawn to the panel's attention.

The BJOG article was accepted for publication on June 16, 2004, without Romero's knowledge; Romero first learned that Buhimschi had resubmitted their joint research for publication to the BJOG through Yale's press release on or about January 26, 2005, *after* the BJOG had already published the article in electronic form; Wayne State's first communication with the BJOG was sent on January 31, 2005; and the manuscript was published in "hard copy" in the February, 2005 issue of the BJOG. **Appellant's Brief (AB)** at 16-18, 20, ¶ 22, 25-27, 31. Romero did not personally communicate with the BJOG until several months *after* the article had already been published.

* * *

[p.5] * * *

However, even more important than the factual assertions in the panel's opinion that are untrue, are the facts the panel ignored altogether. There are too many to catalogue all of them but among the more relevant to the question of consent are: (1) the email correspondence between Weiner and Thornton in October, 2003, **AB** at 15, ¶ 20; (2) the meetings and correspondence between Romero and Yale officials in July/August, 2003, **AB** at 13, ¶ 18; (3) Romero's October 14, 2003 letter to Buhimschi, **AB** at 14, ¶ 19; (4) Thornton's February 24, 2005 reply to Oliver, **AB** at 20, ¶ 32; (5) Buhimschi's failure to appear at the hearing and respond to allegations of scientific [p.6] misconduct in the proper forum. **AB** at 15, ¶ 21. * * *

For example, since Romero told Yale officials and Buhimschi that several of the factual assertions that later surfaced in Buhimschi's Appeal Letter on which suit was based were false, consent to them cannot be imputed to Romero, a principle this Court recognized in *Compuware*, 499 F.3d at 526, but one the panel failed to apply and disregarded entirely. *See* **AB** at 49-53; **Appellant's Reply Brief (ARB)** at 18-20. The email correspondence between Weiner and Thornton in October, 2003, and details of Thornton's reply to Oliver the Court disregarded,[1] also preclude implying Romero's consent to the republication of the same defamations in Buhimschi's Appeal Letter and Weiner's email at Yale, albeit for different reasons. **AB** at 53-57.

* * *

[p.8]

1. The panel disregarded relevant decisions by the Michigan Supreme Court.

* * * The question before the panel on appeal was whether the Michigan Supreme Court would imply consent to factually false statements published with knowledge of falsity from a person's conduct.

It is evident from the Michigan Supreme Court decisions Romero briefed but the panel disregarded that statements that are merely "invited", or made in response to allegations of wrongdoing, are not absolutely privileged under Michigan law, and that the Michigan Supreme Court would not protect factually false statements published with knowledge or reckless disregard of falsity with an absolute privilege by implying consent to them from a person's conduct. **AB** at 45-49; **ARB** at 5-9.

Shinglemeyer v. Wright, 124 Mich. 230 (1900) is the only case [p.9] in which the Michigan Supreme Court has applied an absolute privilege to the publication of defamatory statements at large (i.e. outside of judicial proceedings, etc.). The plaintiff in that case, who was falsely accused by the defendant of stealing his wheel, personally called the police to the defendant's office, waited in defendant's office until the police arrived, and then demanded that the defendant repeat his allegations against her to the police. *Id.* at 240-41. The court said that no suit could lie on such a publication because it was equivalent to the plaintiff herself reading defamatory statements in a letter to others. *Id.* (citing *Sylvis v. Miller*, 96 Tenn. 94 (1895)). The court based its holding on the maxim "*volenti non fit*

injuria". *Shinglemeyer* at 241, This indicates that the court concluded that the plaintiff had consented to the publication because the maxim stands for the proposition that a person cannot base suit on conduct to which he or she has consented.

The Michigan Supreme Court has never applied an absolute privilege to defamatory statements independently of their content where the plaintiff caused them to be published less directly, i.e. by "inviting" them rather than demanding or insisting on their publication. For example, in *Schultz v. Guldenstein*, 144 Mich. 636, 640 (1906), [p.10] the court said that if the plaintiff had requested that her husband ask the defendant if he (the defendant) was claiming that she stole his money, an absolute privilege would attach only if the defendant's responses were "honest".

In *Fortney v. Stephan*, 237 Mich. 603, 606-07 (1927), the Michigan Supreme Court held that an absolute privilege does *not* attach to defamations about public officials that are "invited" if false statements are published with knowledge of falsity, and that a jury instruction to the contrary was erroneous. The court, however, went further, and explained that a person "may not take advantage of the occasion brought about by invitation or challenge to indulge his malice, but, in responding, must do so in good faith and not go beyond the occasion." *Id.* In other words, a person who requests a hearing to discuss an accusation/adverse decision, as plaintiffs did in three

cases relied on by the panel,[2] cannot defend herself by making factually false counter-allegations with knowledge or reckless disregard of falsity, as Buhimschi did in this case. Nor were such statements made in these three cases or in any other case on which the panel relied.

[p.11] * * *

In *Smurthwaite*, 124 Mich. at 382-83, the Michigan Supreme Court held that in responding to an "attack" a person is entitled to make a vigorous defense, including caustic and acerbic comments, but is not privileged to make defamatory statements of a general nature or false statements with malice. This is precisely what Buhimschi did in this case by accusing Romero of all manner of improprieties, and by making factually false defamatory statements about him she knew were false. **ARB** at 4-5, 16-17. But the panel dismissed *Smurthwaite*'s [p.12] holding by contending that court's use of the phrase "self-defense" indicated that the Michigan Supreme Court was not addressing the "consent privilege" but a "self-defense privilege". Op at 20-22.

This distinction is, to say the least, specious because the *only* legal consequence triggered by Romero's allegation of wrongdoing against Buhimschi was Buhimschi's right to defend herself, and *Smurthwaite* unequivocally held that Buhimschi was *not* privileged to do this by engaging in general

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[2] *Schechet v Kesten*, 3 Mich. App. 126, 130, 133 (1966); *Hollowell v. Career Dec Inc.*, 100 Mich App. 561 (1980); *Heike v. Guevara*, No. 09-10427-BC (E.D. Mich. Feb. 9 2010).

defamation or by making false statements "maliciously", *see* 124 Mich. at 382-83, a holding the court reaffirmed in *Fortney*, 237 Mich. at 607 (person must respond to a challenge in good faith). The panel's grounds for dismissing *Smurthwaite*'s holding further conflicts with Sixth Circuit and U.S. Supreme Court t precedents.

First, courts have uniformly abjured what the panel did to dismiss *Smurthwaite*'s holding - elevate form over substance by relabeling *Smurthwaite*'s holding as applying only to a "self-defense" and not a "consent" privilege. *Bowen v. Gilliard*, 483 U.S. 587, 605-06 (1987) (rejecting argument that "places form over substance, and labels over reality); *Briscoe v. Fine*, 444 F.3d 478, 499 (6th Cir. 2006) [p.13] (cannot evade force of law by relabeling claims). Although "labeling device[s]...could work very well in the obvious cases...[they] might lead to arbitrary decision[s]" in less obvious ones. *See Kewin v. Mass. Mutual*, 409 Mich. 401, 438 (1980)' *accord Hatch v. Grand Haven Twp*, 461 Mich. 457, 465 (2000) (whether a path is a sidewalk on a highway cannot be determined by how the path is labeled).

Second, the panel's contention that the vitality of *Smurthwaite* is impaired by the U.S. Supreme Court's subsequent decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and by the fact that the defamations were published in a newspaper, Op at 23-24, is inconsistent with the holding of *Sullivan* and other U.S. Supreme Court cases. *Sullivan* and its progeny do not undercut *Smurthwaite*'s holding because it does not require States to afford an absolute privilege to statements made in response to allegations of wrongdoing, and only requires some plaintiffs to

prove that defamations were published with knowledge or reckless disregard of falsity rather than "ill will" or "hatred". *See* 376 U.S. at 279-80. The panel's attempt to distinguish *Smurthwaite* because the defamations were published in a newspaper is also inconsistent with U.S. Supreme Court precedents, for, as Justice [p.14] Burger pointed out in concurrence,

> "The First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn".

Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 773 (1985) (Burger, J., concurring).

In *Dadd*, decided during the pendency of this appeal, the Michigan Supreme Court yet again reaffirmed *Smurthwaite*'s holding that only a qualified privileges attaches to statements made in response to allegations of wrongdoing under Michigan law. *Dadd* is dispositive of this case because it involved the same three-step factual scenario that obtained here, but the panel disregarded the case completely.

* * *

[p.15] * * *

The issue in *Dadd* was whether the trial court erred in failing to instruct the jury that, in order to find for the plaintiff on her defamation claim, it had to find that the defamations were published with malice. The majority held that the error was harmless because

the plaintiff's false light and defamation claims were based on the same set of facts, and the court had instructed the jury that it had to find malice to find for the plaintiff on her false light claim. Since the jury did find for the plaintiff on that claim, the majority concluded that the jury must have determined that the defamations were published with malice, and, therefore, that the plaintiff had met her burden on the malice element of her defamation claim. However, the majority and dissent agreed that only a qualified privilege attaches to statements made in response to allegations of wrongdoing. *Dadd* at 6-8. Therefore, *Dadd* is an authoritative statement of Michigan law that clearly indicates that the Michigan Supreme Court would not apply an absolute privilege to [p.16] statements made in response to allegations of wrongdoing under the rubric of "implied consent", and flatly contradicts the panel's holding. The panel's disregard of *Dadd* conflicts with settled Sixth Circuit precedent. *Montes*, 599 F.3d at 496.

2. The panel relied solely on cases that have no precedential value and that had facts very different from the facts of this case.

* * * A court may rely on cases with no precedential value if it finds their reasoning on a particular issue persuasive, *Robinson v. City*, 282 Mich. App. 610, 619 (2009), but not a single case relied on by the panel discussed or explained the doctrine of implied consent and merely asserts it. The panel merely reasserted the conclusions of these cases without analyzing their facts, and, therefore, did not appear to realize that the cases had facts very different from the facts of this cases, and did not support the panel's holding.

Five of the seven Michigan Court of Appeals cases relied on by [p.17] the panel involved either express written waivers or self-publication,[4] releases and express consent,[5] or an express written demand that the statements sued on be published.[6] *Heike*, *supra* note 2, like *Schechet*, on which the court relied for its holding, involved a written request for a hearing *by the plaintiff*. Therefore, these six cases involved express written consent or a similar fact pattern to *Shinglemeyer* where the plaintiff demanded that the defendant repeat his defamatory allegations. There was no evidence that factually false statements were published with knowledge or reckless disregard of falsity in these cases, and, therefore, they provide no authority for implying consent to such statements in this case.

Romero signed no written waivers, did not publish Buhimschi's defamations himself or demand that she publish them, nor sued on statements made at a hearing he had expressly requested. On the contrary, Romero specifically told Buhimschi (and Yale officials) that [p.18] her statements to Yale officials explaining

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[4] *Ramsey v. Speedway SuperAmerica LLC*, No. 279034 *6 (Mich. Ct. App. Aug. 14, 2008) (unpublished); *Jaafar v. Sabon*, No 229992 *2 (Mich. Ct. App July 9, 2002) (unpublished); *Merritt v Detroit Mem. Hosp* , 81 Mich.App. 279, 283, 286 (1978) (plaintiff published the defamation sued on herself and also signed an express waiver).

[5] *Leftwich v. Lula Belle Stewart Ctrs.*, No. 270089 *2-3 (Mich. Ct. App. Nov. 14, 2006) (unpublished) (indicating that publication was made pursuant to a signed release and that there was express consent to the publication).

[6] *Schechet*, 3 Mich. App. at 130, 133.

why she removed Romero's name from authorship of their joint research were false, after he learned of them from Naftolin. **AB** at 13-14, ¶ 18, 19. Moreover, Buhimschi did not publish her statements at the hearing on the allegations of scientific misconduct against her, i.e. in a proper forum, **AB** at 15, ¶ 21, and went "beyond the occasion" by making false statements about Romero with knowledge or reckless disregard of falsity. Six of the eight cases relied on by the panel, therefore, have facts completely different from this case, and provide no authority for the panel's holding.

In *Hollowell*, the *plaintiff* also specifically requested that the board of directors discuss defendant's dissatisfaction with her performance, and the court found no evidence that anything said about the plaintiff at the meeting was false. *See* 100 Mich.App. at 574-75. *Hollowell*'s statements concerning consent are also *obiter dicta*, and the Michigan Supreme Court cited *Hollowell* for the proposition that the defendant was entitled to a "qualified privilege", not that the plaintiff consented to his statements. *Dadd* at 8. The Southern District of New York also noted that *Hollowell*'s *dicta* on consent were [p.19] inconsistent with, *inter alia*, Restatement, Second, of Torts, § 583. *See Mendelblatt v. Perelman*, 683 F.Supp. 379, 384 (S.D.N.Y. 1988); **ARB** at 9-11. Therefore, *Hollowell* is also distinguishable on the facts from this case, and provides no authority for implying consent to the false statements Buhimschi published about Romero with knowledge of falsity and for the panel's holding.

In *Medical Planning Consulting v. St. Mary's Med. Ctr.*, No. 214018 (Mich. Ct. App. June 13, 2000), the last, and only case relied on by the panel to involve the

three-step factual scenario that obtained in this case, the publications sued on were very different from the publications in this case, and there was also no evidence that false statements were published with malice. The plaintiff (through her lawyer) published her threat to sue for breach of contract solely to the defendant, and the defendant published his response solely to the plaintiff's lawyer, not a third party. *Medical Planning* at 3. But even if *Medical Planning* had involved the publication of false statements with malice to a third party, which it did not, to construe it as legal authority for the proposition that false statements made with knowledge of falsity in response to allegations of wrongdoing are absolutely privileged [p.20] under Michigan law is to trump Michigan Supreme Court precedents with an unpublished intermediate appellate court decision, which the applicable standards did not permit the panel to do.

* * *

APPENDIX PP

EXCERPT FROM CORRECTED REPLY BRIEF
In the United States Court of Appeals
for the Sixth Circuit
Docket No. 09-1195
Date of Filing, April 5, 2010

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[p.15] * * *

Romero was arguing that the "reason to know" requirement limits the kind of factual assertions to which consent will be implied to statements that have some actual basis in the real world, and from which their potentially defamatory character could reasonably have been known by the plaintiff. This is what the Mississippi Supreme Court was alluding to when it said that a person cannot be expected to anticipate being accused of something that never happened. *New Orleans Great N.R.*, 130 So. at 497.

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[p.16] * * *

For example, Romero had no reason to know that Buhimschi might allege that he presented the SELDI research at NICHD as though it was his own, **Dock.No.119-#4**, ¶ 1.7, because he only presented the work because she was traveling abroad, Romero took a picture of Buhimschi to show during his presentation

to acquaint NICHD personnel with who she was, gave Buhimschi a copy of the slides he presented on her behalf, and she told him "it looks nice". **Dock.No.87-#7, #8, #9** (Ex. C-D).

Romero had no reason to know that Buhimschi would make the allegation that he caused her husband's contract not to be renewed so she would not have access to clinical materials, **Dock.No.119-#4**, ¶ 1.13, because that decision was based entirely on her husband's clinical competence, was made by WSU faculty, and had nothing to do with Romero or the PRB. **Dock.No.131-#18** (Affidavit of Sorokin). Nor did Romero have any reason to know that Buhimschi would accuse him of being abusive towards her, **Dock.No.119-#4**, ¶ 1.9, because when she discussed her husband's difficulties at WSU with [p.17] Romero on October 3, 2002, and Romero asked her if she intended to stay at WSU, Buhimschi said of their research collaboration,

> "I need the interaction and I need the intellectual stimulus that you give to me. That's why I want to work with you..."
>
> "Let me tell you something, the relationship that I have with you, I am very happy and content..."

Dock.No.120 at 13. Romero had no basis to divine that Buhimschi would say such things to justify removing his name from authorship, and, therefore, had no "reason to know".

* * *

APPENDIX QQ

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Sent: Thursday, August 29, 2002 5:41 PM
To: Buhimschi, Irina

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Dear Irina:

I am very sorry to learn about this mishap and hope that you, Catalin, and your mother are fine. I used the presentation as you have seen it and everything went very well. I made a point to credit you for your efforts. In terms of the reaction, I will need to examine this next week after it sits in the minds of other colleagues and the Scientific Director for a few days. I am cautiously optimistic that I will be able to persuade the leadership of the Institute that this is an area worthy of investment.

I am at NIH and will be back in the office tomorrow.

With warm personal regards,

Roberto Romero, MD.
Chief, Perinatology Research Branch
Intramural Division, NICHD

* * *

--- Original Message—
From: Buhimschi, Irina
Sent: Thursday, August 29, 2002 5:33PM

* * *

Dear Dr. Romero,
I would like to let you know that due to an unfortunate situation (visa issue) I was forced to return back to Detroit. Thank you for the slides. I looked over the slide presentation and it looked very nice. Please let me know how did the presentation go and how was our work perceived by the NIH panel.

Irina